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IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY M. EVANS, SR.
Petitioner

versus

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA
Respondents

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR *WRIT OF CERTIORARI*

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37 pp

QUESTIONS PRESENTED

I.) Whether the Louisiana Supreme Court erred in abandoning requisites established in *Daubert v. Merrell Pharmaceuticals,* for a *per se* admissibility rule of polygraph evidence in civil service hearings.

II.) Whether the Louisiana Supreme Court erred in accepting polygraph evidence as inherently reliable scientific methodology.

III.) Whether Louisiana Revised Statute Title 33 is unconstitutional as applied in this case by the Louisiana Supreme Court, as it allows a civil servant to be deprived of a property right without due process of law as guaranteed by the 5th and 14th Amendments of the United States Constitution.

IV.) Whether the refusal of the Louisiana Supreme Court to review the reliability of polygraph violated Officer Evans' right to substantive and procedural due process?

V.) Whether the Louisiana Supreme Court erred in placing the burden on an opponent of polygraph evidence to prove unreliability by providing the existence of irregularities in the procedure, contrary to *Federal Rule of Evidence* Article 104(a) and Louisiana's counterpart, *Louisiana Code of Evidence* Article 104(a)?

VI.) Whether the Louisiana Supreme Court erred in finding admissible, as an exception to the hearsay rule, hearsay statements of a convicted murder, part of which contained hearsay-within-hearsay of yet another convicted murder, as "statements against interest" as defined in *Louisiana Code of Evidence* Article 804B(3) and its counterpart, Federal Rule of Evidence Article 804(b)(3).

VII.) Whether the Louisiana Supreme Court erred in overturning the decision of the Third Circuit Court of Appeals, and finding sufficient evidence existed for termination of employment of Officer Johnny Evans, Sr., DeRidder City Police.

In compliance with Rule 14.1 (b) all parties to the proceeding are listed in the caption of the case.

In compliance with Rule 29.6 , it is disclosed that there are no parent corporations and no companies holding ten percent (10%) or more of the corporations stock involved in this case.

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State v. Rimmasch, 775 P. 2d 388, 398 (Utah 1989)

OPINIONS BELOW

The opinions of the DeRidder Municipal Fire and Police Civil Service Board, the 36th Judicial District Court for Beauregard Parish, Louisiana, the Third Circuit Court of Appeals of the State of Louisiana, and the Supreme Court of the State of Louisiana.

BASIS FOR JURISDICTION

The judgement of the Supreme Court for the State of Louisiana was entered on May 24, 2002. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. 1257.

STATEMENT OF THE CASE

The petitioner, JOHNNY M. EVANS, SR., has been in law enforcement a majority of his entire life. He served twenty-two (22) years in the United States Army, during which he was in the military police for fourteen (14) years. He had a Top Secret clearance rating. Following his military career, Officer Evans was employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life.

On or about June or July, 1997, Johnny M. Evans, Sr., contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due to his son's possible involvement in drug activity. Officer Evans advised these officers that his son was beginning to have expensive things, and he didn't feel as if he were making that much money at his present job. Officer Evans asked them if they would check him out to see if he were involved with drugs

(Tr. p. 38). In another incident, Officer Evans suspected his nephew, who was living with him, of being involved with drugs. He contacted Sergeant Pine of the DeRidder City Police, and summoned a drug detecting dog unit to search his house. The search yielded crack cocaine. Officer Evans has an unblemished record in life as well as in law enforcement. His actions have proven he will tolerate no wrongdoing, even by his own family members.

Petitioner, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997, for allegedly disclosing information concerning the identity of a drug informant, Earnest Prater, to his son, Johnny Evans, Jr., and Eric Pickens. The termination became effective October 31, 1997, at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police Arvin Malone, dated October 29, 1997, whieh stated, in pertinent part:

1. Patrolman Evans is a friend of Pickens:
   A. There is no logical reason Eric would makeup such a story on a friend.
2. Eric made accusations before he was a suspect and again after becoming a suspect.
3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.
   A. Many times different people are thought to be Confidential Informants For Law

Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people accused of being Confidential Informants as the suspects are accused of doing. This would indicate that they most likely had a strong confirmation from someone in position to know for certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.
2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself f rom possible criminal charges.
3. To protect himself from possible civil liability.

4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities, Judges, District Attorney, etc.

The petitioner, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment [see letter from Chief Arvin Malone dated September 25, 1997 (Tr. Ex. 3)]. As stated by the examiner,

> The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr.

On November 3, 1997, petitioner's counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") challenging the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997. On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Tr. pp. 203-205). Johnny Evans, Sr., appealed to the District Court, which affirmed the Board's decision. Johnny

Evans, Sr. appealed to the Louisiana Third Circuit Court of Appeal which reversed the ruling of the district court. Defendant applied to the Louisiana Supreme Court for a *Writ of Review* which was granted and briefing schedules were set. The Louisiana Supreme Court reversed the ruling of the appellate court, thereby reinstating the termination of employment of Officer Johnny Evans, Sr., from the City of DeRidder Police force.

REASONS TO GRANT WRIT

1. Petitioner's Procedural Due Process Rights were violated by admission of polygraph evidence without *Daubert/Foret* inquiry.
2. Louisiana Revised Statute 33:2561 unconstitutionally deprives petitioner's due process rights by prohibiting *denovo* review of fact finders legal determinations.
3. Petitioner's substantive and procedural due process rights were violated by Louisiana Supreme Court's *per se* acceptance of polygraph results as admissible in an administrative termination hearing.

ARGUMENT

QUESTION NO. 1 PRESENTED:

> "We find that these policy reasons support the admissibility of the polygraph results . . ." (La. Supreme Court Ruling, p. 8) **(Emphasis Added).**

In disregarding the mandates established in *Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 113 S.Ct. 2786, 125*

L. Ed. 2d 469 (1993), the Louisiana Supreme Court opted for a rule of admissibility, for polygraph evidence in administrative hearings, based entirely on policy. These "policy" reasons are set forth in its opinion, as follows:

1.) Jurisprudence upholding the termination of a civil servant for refusing to submit to a polygraph examination (p. 6).
2.) Reasons advanced by a leading commentator, Frank I. Maraist, supporting different treatment of evidentiary issues in administrative hearings (p. 8).
3.) Officers of the law are symbols of public trust and must remain above all suspicion, which demands immediate corroboration of his statement denying any wrongdoing (p. 8).
4.) Louisiana has enacted a statute regulating polygraphists, La. R.S. 37:2831, *et seq.* (p. 8).

The jurisprudence relied upon by the Court, as a policy consideration, does not support admissibility, however, absent reliability determinations and procedural safeguards. In *Creadeur v. Department of Public Safety, Division of State Police*, 364 So. 2d 155 (La. App. 1 Cir. 1978), an officer was terminated for refusing to submit to a polygraph examination. In confirming the termination, the Louisiana First Circuit Court of Appeals considered the reasonableness of the request and was impressed by testimony from the appointing authority that the results would not be used to discharge the officer. *Id.* at 156. In the case at bar, Officer Evans was offered no such condition and/or limitations.

Clearly, the rule of admissibility articulated by the Louisiana Supreme Court can only lead to misuse and abuse especially by panels of lay persons -- of even the most basic evidentiary procedures and principles.

QUESTION NO. 2 PRESENTED:

State of Louisiana v. Foret, 628 So. 2d 1116 (La. 1993) is the case in which the Supreme Court of Louisiana adopted the *Daubert*, *Id.* requirements for the admissibility of expert scientific testimony. Foret, Id., dealt with the admissibility of psychological testimony based on Child Sexual Abuse Accomodation Syndrome (CSAAS) to bolster witness credibility. Therein, the Louisiana Supreme Court was reviewing a record which was silent regarding any efforts by the trial court (to fulfill its "gatekeeping" function) to determine the soundness of testimony based on CSAAS.

At footnote 8, the Louisiana Supreme Court noted the standard for acceptance of such expert testimony, absent an evidentiary hearing on its admissibility.

> "8. In the absence of such a hearing, only a scientific method's proven 'inherent reliability' will allow a court to take judicial notice of the accuracy of scientific testimony and evade the requirement for an evidentiary hearing on the reliability of such testimony. See *State v. Rimmasch*, 775 P. 2d 388, 398 (Utah 1989). The *Rimmasch* court went on to note that CSAAS was not so inherently reliable so as to justify a court's taking judicial notice of the

> reliability of such testimony. *Id.*, at 401."

In recognizing this absence, the Louisiana Supreme Court seemingly conducted its own *de novo,* review of CSAAS reliability (presumably, the authorities and treatises considered by the Louisiana Supreme Court are not contained in the record, as the Court stated at p. 1124, "If the trial court had conducted a hearing, it might have discovered the misgivings many experts and courts alike have with the this type of testimony . . ." *Id.* at 1124).

In the absence of the necessary evidentiary inquiry by the lower courts, the Louisiana Supreme Court in *Foret*, felt compelled to conduct the same. Certainly, the judiciary is under no less of a burden when the case and accompanying opinion originate from an administrative panel of lay persons. In failing to do so, the Louisiana Supreme Court has accepted polygraph evidence as a science which is inherently reliable.

While reaching its conclusion, the Louisiana Supreme Court acknowledged that "competent" evidence (as when it accepted the polygraph results) is evidence that "has some degree of reliability and trustworthiness and is the type that reasonable persons would rely upon," (p. 8 of opinion, citing *Chaisson v. Cajun Bag and Supply Company*, 708 So. 2d. 375 (La.1998). In support of its conclusion, the Court relies on one (1) paragraph of facts, which include:

1.) the polygraphist has been licensed by the State of Louisiana since 1985, board certified, conducted polygraphs for numerous state agencies and has conducted a total of approximately 500-600 polygraphs;
2.) the polygraphist was cross-examined vigorously on the possible inaccuracies of polygraph;
3.) no irregularities in the test were established that would be groundsfor excluding the polygraph in this case.

Accordingly, the Louisiana Supreme Court has concluded from one (1) skeletal paragraph of facts an issue which continues to be divisive among higher authorities.

> "The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques". *U.S. v. Scheffer,* 118 S. Ct. 1261, 1264.

In determining whether the expert is proposing to testify to opinion based on scientific knowledge, the record must include an inquiry into the evidentiary relevance and reliability of the principles that underlie a proposed submission. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). Such factors include:

a.) What is the known or potential rate of error?
b) What standards exist to control the techniques operation?
c.) Can the hypothesis be and has it been tested?
d.) Has the theory or technique been subjected to peer review and publication?

e.) What is the degree of acceptance of the technique within the relevant community? *Id* at 2797

While the polygraphist in this case submitted an unbelievable rate of error of one (1%) percent, the most telling disclosure was that this rate of error is <u>not</u> verifiable.

"Q. Have you ever made a mistake in any of these five or six hundred polygraph examinations you've conducted?

A. Yes, sir, I have.

Q. And about how many?

A. Well, verifiable would be difficult; but I would say the number would be between five and ten." (Tr. p. 136 lines 8-13)

This record is somewhat silent on the existence of standards to control the technique's operation. Likewise, it is respectfully submitted that there are no established procedural safeguards to insure accuracy in the administration of the polygraph. The machine used on Officer Evans was the Auther VI (Tr. p. 125), which, according to the polygraphist is <u>not</u> in general use. (Emphasis Added).

"Q. And was the polygraph used for the examination of Mr. Evans an instrument in general use?

A. Well, it's not an instrument in general use, because Dick Arther has polygraphs made to his specific -- to his specifications, as opposed to nowadays you can get them that's computerized and people go with computer. You can get polygraphs that are electronically enhanced. The Arther VI that I use is not electronically enhanced. In other words, the recording is an actual recording from the person; it is not enhanced to get a better reading off of it." (Trans. p. 124 lines 21-25 and p. 125 lines 1-5)

The most notable disclosure by this polygraphist was a total lack of knowledge as to how his machine (Arther VI) functioned.

"Q. You're not an engineer of any kind?

A. No, sir, I'm not.

Q. Electric engineer or anything of that sort?

A. No, sir.

Q. And you didn't build this polygraph?

A. No, sir, I did not.

Q. And you don't know, from an engineering standpoint, what makes that part of it work?

A. I am not an electronic engineer; I don't know what makes it work" (Tr. p. 129 lines 10-19).

Yet, notwithstanding this total lack of knowledge of the inner functions of the Arther VI, and the non-existence of safeguards regulating repair, this polygraphist performs his own repairs when his machine malfunctions or breaks.

> "Q. You indicated, in response to Mr. Lestage's questions, you're not an engineer. You don't know how that machine works, it's inner - - I mean, you don't know its inner functioning. You couldn't take it apart and put it back together.
>
> A. Well, I don't say I couldn't do that, because I do my own repairs. But as far as taking - - looking at the little transformer and know why that transformer does all this, no. But if there's something wrong with my polygraph, I generally fix it myself. If that transformer needs changing, I'll order a new one and change it. But as far as what makes the transformer, you know, affect the components inside, no" (Tr. p. 161 lines 18-26, p. 162 lines 1-3).

The paradigm in the State of Louisiana is the use of the Intoxilyzer 5000 for determination of intoxication. It can be presumed that few, if any, officers administering the Intoxilyzer 5000 know the inner functions of this machine or how to repair it, although they are certified to <u>administer</u> the test. Consistent with its widespread use, the state established extensive

safeguards, through the *Louisiana Registry*, (Title 55, Public Safety) for the use, maintenance, calibration and admissibility of test results. The machine must be calibrated with a known sample within four (4) months of administration of a test to be used in evidence at trial (*Louisiana Registry*, Title 55 Public Safety Chap. 5 Section 501), and a certificate must be issued and filed in the records of the Clerk of Court in the judicial district in which the test is administered. Each inspector must be periodically re-certified, *Louisiana Registry*, (Title 55 Public Safety Chap. 5 Section 507).

These safeguards apply to detection of blood alcohol content, a much more exacting science than determining the veracity of statements made by a test subject. Yet, this record is silent on the existence of any such rules or regulations for the Arther VI.

This polygraphist disclosed other factors suggestive of the abstract, inexact and subjective nature of polygraphy.

1. "Q. We'll get to that in a minute. One other thing I want to touch on that you just gave in your explanation. So now you're telling me that during this test or to arrive at your conclusions, you relied on body language and demeanor of Johnny Evans.

   A. Well, it has - - It has some - - It has some play in it; but the bottom line is

the chart - - is the chart analysis." (Tr. p. 167 lines 15-21)

2. Q. And further, you stated, and I'll quote, "A positive truthful person would possibly have answered.., "quote, " I will pass because I know I did not do this thing," unquote, "etcetera." So what I'm getting to is, obviously, "should do good" is not a positive response is that, Mr. Trahan?

A. Well, no, it's not a positive response. You know, I'm going to pass this," is going to be a positive response." (Tr. p. 172 lines 2-6)

3. " . . . He swallowed at that particular point. That's a sign of relief from a person that was stressed by the particular question - - "(Tr. p. 157 lines 7 - 9)

4. " . . . the liar will tend to rate the polygraph on the low end of the scale. A truthful person would tend to rate it on a higher end of the scale . . . " (Tr. p. 131 lines 22-24)

5. " . . .when a questions places him under stress and <u>they are thinking about their</u>

heart rate increasing and everything, they're going to change their Breathing; and it's going to have a direct - - reflect directly down on the heart - - " (Tr. p. 149 lines 13-17)

(Emphasis Added)

6. " . . . Mr. Evans, in my opinion did not tell the entire truth on this particular issue" (Tr. p. 146 lines 11-12) **(Emphasis Added)**

7. "Q . . . I want to revisit one question. Can you distinguish between partial truths and lies on your test?"

   A. No, absolutely no." (Tr. p. 164 lines 21-23)

8. "Q. He interpreted the question to mean that you were indicating he was telling you lies on all questions up to that point."

   A. No; he didn't give me any indication of that. He didn't - - - Normally, when a person feels that way, they'll look at me and say: What, you're calling me a liar? And then I have to explain to them: No, no, no; I'm not calling you a liar; what I'm trying to do is to get these areas in your past out of they way so there's no -- - something don't show up on the

> chart that could be misinterpreted as that question." (Tr. p. 179 lines 2-4)

As stated by the Louisiana Third Circuit Court of Appeals:

> While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners . . . affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. 'Although an adequate instrument is essential for proper testing, the role of the examiner in interviewing the examiner, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.' Thus, the skill of examiners fundamentally affects the ultimate reliability of the test However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, **there is no**

scientifically proven cause and effect connect- ion between an increase in the pertinent physiological reactions and "truth telling.

Indeed, some authors noted that "[t]he heart of the present critique of the polygraph is that **no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.** Furthermore, there is 'no known physiological response that is unique to deception,' and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, Heads or Tails: The Employee Polygraph Protection Act, 39 CATH.U.L. REV. 235, 264 (1989); *Johnny M. Evans, Sr. v. DeRidder Municipal Fire & Police Civil Service Board*, State of Louisiana, Court of Appeal, Third Circuit, Docket No. 01-118.

This record answers the remaining *Daubert*, supra requisites in much the same manner. "There is simply no consensus that polygraph evidence is reliable". *United States v.Scheffer,* supra.

The opinion of the polygraphist is also subject to the balancing test set forth in *Louisiana Code of Evidence* Article 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

Officer Evans was terminated from his employment solely as a result of the polygraph results. Consider this exchange:

MR. LESTAGE:

". . . Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired." (Tr. p. 82 lines 19-21)

* * *

MR. LESTAGE:

". . . I object to that. He asked - - He ordered the man, Mr. Evans, Sr., to undergo a polygraph examination to help in that determination. If the man had passed, he'd still be on force and on salary. I mean, it's that simple." (Tr. p. 115 lines 1-6)

It is not a difficult transition to consider the test result having identical conclusive effect with the members comprising the Civil Service Board at Officer Evans' hearing.

QUESTIONS NO. 3 AND 4 PRESENTED:

La. R.S. 33:2561, in pertinent part, establishes the procedure for an appeal of a civil service commission decision, as follows:

". . . and file the complete transcript with the designated court and that court thereupon shall proceed to hear and determine the appeal in a summary manner. The hearing shall be

> confined to the determination of whether the decision made by board was made in good faith for cause under the provisions of this Part. No appeal to the court shall be taken except upon these grounds." **(Emphasis Added)**

The Fifth and Fourteenth Amendments of the United States Constitution prohibit the deprivation of property without due process of law. In the case at bar, Officer Johnny Evans, Sr., was a classified civil servant as established in La. Const. Art. 10, Section 2(A), (and was subject to discipline as set forth in Section 8(A), and as further defined in La. R.S. Title 33). His job, therefore, constitutes a vested property right protected by the Fifth and Fourteenth Amendments of the United States Constitution. Termination can only be through and/or by due process of law. *AFSCME Council #17 v. St. ext rel DHH,* 789 So. 2d 1263 (La. 2001).

WHEN IS DUE PROCESS DUE?

The specific dictates of due process generally require consideration of three distinct factors:

1.) the private interest that will be affected by the official action;
2.) the risk of erroneous deprivation of such interest through the procedures used, and probable value of additional or substitute procedural safeguards; and,
3.) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. See *Matthews v.*

Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed 2d 18 (1976).

Simply put, a trial *de novo*, or an appellate review of reliability [see State v. Foret, 628 so. 2d 1116 (La. 1993) would adequately provide such safeguards, especially and/or particularly in any civil service hearing involving complex legal issues].

The dictates, prerequisites, and procedural safeguards imposed upon all trial courts by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 509 U.S. 579 (U.S. Cal. 1993) (for admissibility of scientific evidence) have been relegated to lay persons by the Louisiana Supreme Court with minimal consideration and without subsequent appellate *Daubert* review.

Experts have been the focus of public outrage and litigation strategy for years. In recent legal history, the ability of an expert to sway a jury or fact-finder has meant billions of dollars for insurance companies and accident victims. Expert testimony has basically eclipsed paternity litigation and has had a substantial impact in the criminal arena. The Louisiana Supreme Court's ruling condones the use of such testimony by lay persons-- in an arena totally devoid of a *de novo* review by a judicial tribunal. It constitutes the initial step over the precipice, down the slippery slope, toward use of a method, devoid of science, to determine

veracity and, therefore, outcome. Truly, 'Boudreaux and his box-o-gadgets' will rule the day under the Louisiana Supreme Court's decision.

To the contrary, the U.S. Supreme Court in *Daubert,* anointed the district judge as a "gatekeeper" for any expert evidence. The trial court is charged with the obligation of ascertaining the soundness of the science and the reliability of the method. This obligation requires scrutiny above and beyond a summary review as provided in Louisiana's Title 33. Such an obligation could be fulfilled only by a *de novo* review, or the review employed in *Foret*, *supra*. *Daubert* and the rights and complexities of substantive and procedural due process mandate a *de novo* review, (as in *Foret*) or a *de novo* hearing, as opposed to Louisiana's scheme under Title 33 of having the District Court sit as an appellate entity without the mandate to review quasi-legal findings.

In *North v. Russell*, 96 S. Ct. 2709, 49 L.Ed. 2d 534 (U.S. S. Ct. 1976) the Court considered the issue of whether Kentucky's system of allowing lay persons to act as trial judges for minor misdemeanors violated the Due Process Clause. The system under review, however, provided for a trial *de novo* in case of an appeal, automatically provided for bail and that a conviction be vacated in the event of appeal. In finding no constitutional infringement, the Court overwhelmingly relied on the availability of a trial *de novo* after any conviction:

> "The right to a new trial is absolute. A defendant need not allege error in the inferior court

> proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean . . . Prosecution and defense begin anew. . . The case is to be regarded exactly as if it had been brought there in the first instance". (citing from *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972)).

In the case at bar, the Louisiana Third Circuit Court of Appeals conducted the pertinent reliability inquiry:

> "If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, Heads or Tails: The Employee Polygraph Protection Act, 39 CATH.U.L.REV 235, 264 (1989); *Johnny M. Evans, Sr. v. DeRidder Municipal Fire & Police Civil Service Board.* State of Louisiana, Court of Appeal, Third Circuit, Docket No. 01-118.

The Louisiana Supreme Court has not only failed to conduct it's own inquiry, but has disregarded the only 'reliability' inquiry made in this case and chosen a basis for admissibility of polygraph based solely on policy reasons.

QUESTION NO. 5 PRESENTED:

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . "

Louisiana's counterpart to Federal Rule of Evidence Article 104(a), Louisiana Code of Evidence Article 104(a) states:

> **"A. Questions of admissibility generally.** Preliminary questions concerning the competency or qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . "

In *Daubert* 509 U.S. 592, 113 S. Ct. at 2796, the Supreme Court stated:

> "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the onset, pursuant to Rule 104 (a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue." (Emphasis Added) (Footnotes omitted).

In the absence of such a hearing, an appellate Court must remand (see *Caubarreaux v. E.I.DuPont De Nemours,* 714 So. 2d 67, (La. App. 3 Cir. 1998) or conduct a *de novo* review (see *State v. Foret*, 628 So. 2d 1116 (La. 1993). No authority or

justification exists for less consideration being extended to evidence adduced in an administrative hearing.

QUESTIONS NO. 6 & 7 PRESENTED:

The hearsay statements of Eric Pickens contain a plethora of inconsistencies. These inconsistencies were, in part, disclosed during Officer Evans' termination hearing (although strenuously objected to by counsel for the City of DeRidder as being irrelevant). Simply put, they are the statements of an individual who participated in a murder, made to feign cooperation with law enforcement, cast another party with involvement, and to extract revenge for Officer Evans' arresting him on August 14 (Tr. p. 87, lines 13-17). As noted by the Louisiana Third Circuit Court of Appeals, the statements contain, at a minimum, two (2) crucial contradictions. Many others, however, exist.

In the statement given on August 28, 1997, Mr. Pickens made no mention of being a participant in the murder of Ernest Prater. Additionally, he stated that Johnny Evans, Jr., was not present when this disclosure was made.

Next, in his statement given on August 31, 1997, Mr. Pickens alleged that the "leaked" information came from Johnny Evans, Jr.:

"Q. Okay, who told uh, who told that Ernest was ratting people out or . . .?

A. Johnny.

Q. How did he know?

A. He said those dudes on Bishop told him.

Q. On Bishop?

A. He didn't say no names. He said some niggers on Bishop told me that Ernie was the one ratting us out.

Q. He never told you nobody else at any time, had he . . he had learnt . . that Ernest, that was the first that you knew Ernest was ratting?

A. Yeah, then I went over there and him and his daddy was talking about it."

The pronoun "him" used in this last statement can only refer to Johnny Evans, Jr., who was the individual being discussed in pp. 1-8 of that statement. Thus, Johnny Evans, Jr., revealed that this information came from "those dudes on Bishop" street. Further, this statement was made at a location other than the home of Johnny Evans, Sr., as Mr. Pickens indicated, "Yeah, then I went over there . . . "In the questioning of Police Chief Arvin Malone, it was revealed that Eric Pickens had made an undercover purchase of drugs from J.J. Johnson.

MR. LESTAGE:

Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

CHAIRMAN WILLIAMS:

Sustained.

MR. JONES

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

CHAIRMAN WILLIAMS

No, sir.

MR. JONES

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a questions in order to complete my proffer.

CHAIRMAN WILLIAMS:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

MR. JONES:

That completes my proffer on that question, Mr. Chairman". (Tr. p. 107 lines 1-25 and p. 108 l 1)

Yet, in his statement of August 31, 1997, Mr. Pickens indicated a lack of knowledge of J.J. Johnson:

Q. Just you there. And he told you that , he had turned you and several more . . . J.J., who is he referring to as J.J.?

A. It's a dude named J.J. I don't know him, though."

Accordingly, it is respectfully submitted that the Honorable Third Circuit Court of Appeals correctly found these statement to lack credibility and trustworthiness.

Louisiana Code of Evidence Article 804 (B)(3) provides an exception to the hearsay rule for statements against interest. Mr. Pickens' statement on August 28, 1997 to Officer Johnson, Pine and Gott did not subject him to criminal liability. It is not a statement against his interest. At no time during that statement

did he profess to be a participant in or have distinct knowledge of the murder of Ernest Prater. Additionally, its inconsistency with the later statement given on August 31, 1997, gravitates toward inadmissibility under the hearsay exception provided by Article 804 (B)(6).

As to the admissibility of the statement given on August 31, 1997, this Honorable Court, in *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431 (1994), held that the term "statement" in *Federal Rule of Evidence* 804(B) (3), does not refer to an extended declaration such as a report or narrative in its entirety. *Louisiana Code of Evidence* Rule 804(B)(3) is identical to the federal counterpart.

> "The fact that a person is making a broadly self-inculpatory statement does not make more credible the confessions non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth . . . "*Williamson*, Id. 2 p. 2435.

The *Williamson, Id.* majority held that the rule did not authorize admission of non-self-inculpatory statements made during the course of another's confession. The Louisiana Supreme Court adopted the *Williamson* rationale in *State v. Smith,* 643 So. 2d. 1221 (La. 1994) Subsequently, this interpretation was followed in *State v. Coates*, 661 So. 2d 571 (La. App. 2nd Cir. 1995), wherein the declarant implicated himself in the crime but attempted to place the ultimate blame on the defendant.

Finally, the City of DeRidder at the trial and appellate court review of this case, has argued for remand of this matter for rehearing due to the conclusion of criminal proceedings against its previously "unavailable" witness. In urging the admissibility of these statements under Article 804(B)(3), the City of DeRidder should concede that the portions pertinent to this proceeding were not "self-inculpatory". The Fifth Amendment, asserted by Pickens at the Civil Service hearing, does not protect against non-inculpatory statements or disclosures. The City of DeRidder had the right and/or obligation to request that the Chairman direct the witness to answer the questions relevant to that hearing, notwithstanding the witnesses urgence of the Fifth Amendment privilege against self incrimination. It chose not to do so. Nor would live testimony by Mr. Pickens negate the existence of inconsistencies and contradictions which rendered his hearsay statement untrustworthy. As counsel for the City of DeRidder astutely pointed out during this hearing,

> ". . .We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and its not - - certainly not for Chief Malone to decide now, nor to have decided on October 29. And we'd object to this line of questioning." (Tr. p. 105 lines 17-25, p. 106 lines 1-2)

Cross examination has been referred to as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 339 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed. 2d 489 (1970) (quoting 5 J. WIGMORE, EVIDENCE, Section 1367). In the case at bar, that asset was denied to the petitioner.

DUE PROCESS AND THE RIGHT TO CROSS-EXAMINE WITNESSES

The Louisiana Supreme Court erred in considering the hearsay statements (of a convicted murderer) as substantive evidence when Officer Evans was deprived of the right of cross-examination.

The right to cross examination is not limited to judicial proceedings. Where a decision or outcome depends on a question of fact, due process mandates an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Never is this so critical as when the evidence is from an individual who might be a perjurer, or a person motivated by malice, vindictiveness, intolerance or prejudice (such as here, Officer Evans previously arrested Pickens and Officer Evans' son supposedly was the reason he was ultimately convicted of manslaughter). The right to show this falsity, in such instances, depends on and requires cross examination.

As stated by the Supreme Court of the United States:

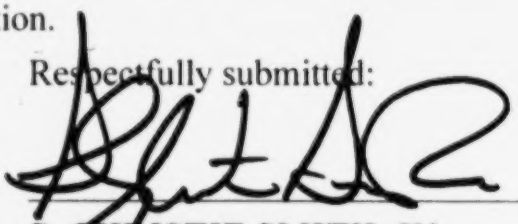
"THIS COURT HAS BEEN ZEALOUS TO PROTECT THESE RIGHTS FROM EROSION. IT HAS SPOKEN OUT ONLY IN CRIMINAL CASES, . . . BUT ALSO IN ALL TYPES OF CASES WHERE **ADMINISTRATIVE** . . . ACTIONS WERE UNDER SCRUTINY" Green v. McElroy, 360 U.S. 474, 496-497 (1959). (Emphasis Added).

CONCLUSION

Officer Johnny Evans, Sr., was a member of the United States Army for twenty-two (22) years and was honorably discharged at the rank of E-7, Sergeant First Class. He was classified with a top secret clearance rating for the last eighteen (18) of those years (Tr. p. 48, lines 13-14). After two (2) years with the Beauregard Parish Sheriff's Office, he joined the force of the DeRidder City Police on April 5, 1993. While with the DeRidder City Police he reported his own family members to the Beauregard Parish Narcotics Task Force for possible drug involvement. His exemplary record itself contradicts the allegations made against him. For the foregoing reasons, the

decision of the Louisiana Supreme Court should be reversed and the petitioner should be re-instated to his position with the DeRidder City Police with back pay including interest from the date of his termination.

Respectfully submitted:



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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY M. EVANS, SR.
Petitioner

versus

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

APPENDIX - VOLUME I

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JOHNNY M. EVANS	:	36TH JUDICIAL DISTRICT COURT
VS. C-97-1106-A	:	PARISH OF BEAUREGARD
DERIDDER MUNICIPAL FIRE, ET AL	:	STATE OF LOUISIANA
FILED: _____	:	_____ DEPUTY CLERK OF COURT

MEMORANDUM IN SUPPORT OF PLAINTIFF'S APPEAL

NOW INTO COURT, comes Plaintiff, JOHNNY M. EVANS, through undersigned counsel, who respectfully submits the following in support of this appeal:

FACTS:

The Plaintiff, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997. The termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

"1. Patrolman Evans is a friend of Pickens:

A. There is no logical reason Eric would makeup such a story on a friend.

2. Eric made accusations before he was a suspect and again after becoming a suspect.

3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.

A. May times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people Accused of being Confidential Informants as the suspects are accused of doing. This would indicated that they most likely had a strong confirmation from someone in position to know for Certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Vans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.

2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself rom possible criminal charges.
3. To protect himself from possible civil liability.
4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities; Judges, District Attorney, etc.

Test results of the polygraph examination - "The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") on the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997.

On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in

good faith for cause.

The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr.

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting evidence which was presented at the hearing by the undersigned counsel. Little, if any, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board. Ultimately, the Board, through their counsel, David Lestage, stated that they relied solely on the results of the polygraph test (see page 105 of the transcript of the hearing held on December 18, 1998, wherein it is stated that):

"By Mr. Lestage:

> "we'll concede that. I mean, that has nothing to do with the matter at hand. This line of questioning is irrelevant. If the Commission will turn to the top of page

three of the discharge letter, it says, "Because of the seriousness and nature of the accusation, officer Evans

was ordered to submit to a polygraph examination in order to boost the credibility of the accused and/or accuser." **That's what we're here about**. We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and it not - - certainly for Chief Malone to decide now, nor to have decided on October 29.
And we'd object to this ~~line~~ of ~~questioning~~."

By Mr. Jones:

"Mr. Chairman, again his argument is inconsistent with the letter. The letter of termination says: **We're relying on the credibility of Pickens.** His argument flies in the face of that, and they're trying to squirm away from it as hard as they can; because he's a liar, and we've caught him lying every time he's turned around in these statements. And this termination letter says: **We are relying on the credibility of Pickens and the polygraph**. But now, since its very inconvenient to rely on the credibility of Pickens because he's lying everywhere, they want to just rely on the polygraph. And I ask you not to let them do that. I ask you to let me explore the inconsistencies so I can get them on the record".

Chairman Williams:

We're kind of wandering way off too far.

Mr. Jones:

I only have one other question in this line, and I'll move on after that, Mr.Chairman.

Q. (Mr. Jones) Are you aware that, in his statement to Detectives Hagan and Smith, Eric Pickens indicates on page ten that he does not Know J.J. Johnson?

Mr. Lestage:

Again, Mr. Chairman, I'M going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

Chairman Williams:

Sustained

Mr. Jones:

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

Chairman Williams:

No, sir.

Mr. Jones:

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a question in order to complete my proffer.

Chairman Williams:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

Mr. Jones:

That completes my proffer on that question, Mr. Chairman."

Claimant contends that his termination was without **good faith and cause** and it is from the Board's decision that he appeals.

That on December 29, 1997, the undersigned counsel filed a Notice of Appeal with the Secretary of the Board. The Appeal, together with a transcript of the hearing and all exhibits have been forwarded to this Honorable Court for a determination of this matter in a summary manner.

LAW

This case comes before this Honorable Court under R.S. 33:2561 wherein it is stated that, in pertinent part:

["the] Court shall proceed to hear and determine the appeal in a summary manner. This hearing shall be confined to the determination of whether the decision made by the Board was made in **good faith for cause**

under the provisions of this Part."

Additionally, and only in the event that it is found that the decision of the Civil Service Board was made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that sufficient evidence is synonymous with "competent" evidence. The decision of the Civil Service Board of the City of DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir.).

Further, the issue to be determined by the Board or by the District Court, in the event an appeal is taken to that Court, is whether the decision of the appointing authority or of the Board was "made in good faith for cause" is construed to mean that the

action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a proceeding challenging termination of a civil service employee is by preponderance of the evidence. The facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board., 688 So. 2d 112 (La. App. 5 Cir.)

In the recent case United States v. Edward G. Scheffer, 118 S. Ct. 1261 (U.S. S.Ct. 1998) , the United States Supreme Court held "**There is simply no consensus that polygraph evidence is reliable**." Consistent with the Scheffer case, Louisiana Courts have excluded such evidence in both civil and criminal cases.

In State vs. Catanese, 368 So. 2d 975 (La. 1979) , the Court ruled that:

> ". . . after considering the evidence in the instant case and studying the authorities and extensive literature in the field, we conclude that it shall be the **judicial policy of Louisiana** to exclude polygraph evidence in criminal trials at this time."

The Court further stated in Catanese that:

> ". . . Our fundamental concern is that the trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion.
>
> * * *. . . extensive procedural safeguards should be established either by court rule or legislation before the introduction of polygraph tests at trial.
>
> * * *. . . In our judgment there has not yet been enough judicial experience with polygraph evidence in Louisiana to provide an adequate basis for judicial rule making on this scale".

After a full reconsideration of the problem of lie detector evidence, the Court in State v. Hocum, 456 So. 2d 602 (La. 1984) declared it to be the judicial policy of Louisiana to exclude for any purpose polygraph evidence in criminal trials. The principal reasons for such exclusion were stated to be (1) the

propensity of triers of fact to give conclusive weight to the polygraph expert's opinion; (2) The lack of a regulatory program for maintaining an adequate level of examiners' ability, experience, education, integrity and availability and (3) The need for procedural rules and safeguards governing the introduction of polygraph evidence. State v. Catanese, supra at 981. See also State v. Whitmore, 353 So. 2d 1286 (La. 1978); State v. Davis, 351 So. 2d 771 (La. 1977); State vs. Schouest, 351 So. 2d 462 (La. 1977); State v. Weeks, 345 So.2d 26 (La. 1977); State v. Governor, 331 So. 2d 443 (La. 1976); State v. Corbin, 285 So. 2d 234 (La. 1973); State v. Refuge, 270 So. 2d 842 (La. 1972). ". . . Subsequently, this court made it clear that the Catanese rule excluding polygraph evidence for any purpose from criminal trials also operates to prevent any reference during trial tot he fact that a witness has taken a polygraph examination with respect to the subject matter of his testimony. State vs. Tonubbee, 420 So. 2d 126 (La. 1982); State v. Davis, 407 so. 2d 702 (La. 1981).

In Edmon O. Hines vs. Arkansas Louisiana Gas Company, et al, 613 So. 2d 642 (La. App. 2nd Cir. 1993) the court agreed that ". . . results of a polygraph examination would be inadmissable", the court ruled that plaintiff could present testimony concerning his offer to take the test . Furthermore, the exclusion of such evidence in civil cases has been consistently upheld on appeal. Rebouche v. Anderson, 505 So. 2d 808 Ola. App. 2nd Cir. 1987), writ denied 507 So. 2d 228 (La. 1987); Associates Financial Corporation v. Carrick 441 So. 2d 1311 (La. App. 2nd Cir. 1983). Indeed, the federal fifth circuit has noted adherence to an unequivocal rule of exclusion, making no exception for civil cases, even in instances where the polygraph results are purportedly offered for a purpose other than asserting the truth of the statements contained therein. See Barrel of Fun, Inc. v. State Farm Fire & Casualty, 739 F.2d 1028, 1031 (5th Cir. 1984); Smith v. Gonzales, 670 F. 2d 522, 528 (5th Cir. 1982), cert. denied, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed. 2d 397 (1982). ". . . the foremost reason for disallowing such

evidence rest with its exaggerated, prejudicial effect upon the triers of fact". Accord, E. Clearly, McCormick's Handbook on the Law of Evidence, 207 at 507 (2d E. 1972). [P]resent-day jurors, despite their sophistication and increased education levels and intellectual capabilities, are still likely to give significant, if not conclusive, weight to such evidence. U.S. v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975). In the case before this Court on appeal, the Civil Service Commission for the City of DeRidder relied strictly on the polygraph evidence and affirmed the termination of Officer Johnny M. Evans accordingly.

In John G. Manale vs. Department of Police, 376 so. 2d 607 (La. App. 4th Cir. 1979), the New Orleans Civil Service Commission used the rule from a criminal case (no polygraph evidence is admissible) and applied it to its' administrative case. The 4th Circuit upheld this application. In Manale, the Court relied on the authority of State v. Corbin, 285 So. 2d 234 (La. 1973) and found that the polygraph test was inadmissable and concluded that the City's case had to stand or fall without the

results of the test.

In Glenn A. Arnold v. New Orleans Police Department, 383 So. 2d 810 (La. App. 4th Cir. 1980) writ denied June 6, 1980, a Civil Service Commission case similar to the instant case wherein an Officer was terminated from his employment, it was the Court's ruling that the Civil Service Board did not err in refusing to accept results of polygraph test. ". . . Excluding the results of the polygraph tests, the question remains whether the evidence in the record supports the appointing authority' sanction by a preponderance of the evidence".

Notwithstanding the propriety of the polygraph, the test results alone or the test results coupled with the suggestions and

assertions of the Chief Arvin Malone's termination letter are insufficient to support the Commissions actions.

BY ATTORNEY:

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CHARLES A."SAM" JONES, III
107 North Pine Street
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(318) 463-5532
La. Bar No. 14404

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Support of Plaintiff's Appeal has this day been forwarded to David R. Lestage, Attorney for the Defendants.

DeRidder, Louisiana, this 2nd day of October, 1998.

CHARLES A."SAM" JONES, III

JOHNNY M. EVANS, SR.	:	36TH JUDICIAL DISTRICT COURT
VS. C-97-1106-A	:	PARISH OF BEAUREGARD
DERIDDER MUNICIPAL FIRE, ET AL	:	STATE OF LOUISIANA
FILED: _____	:	_____ DEPUTY CLERK OF COURT

RESPONSE TO MEMORANDUM OF CITY OF DERIDDER

NOW INTO COURT, comes Plaintiff, JOHNNY M. EVANS, through undersigned counsel, who in rebuttal and/or opposition to the Memorandum filed by the City of DeRidder, submits:

Counsel for the City suggests that Due Process requirements have been met and fulfilled based on the amount of time Patrolman Evans was represented by counsel and the number of communications made thereafter.

Johnny Evans, Sr., was not afforded due process of law in

the Civil Service Proceeding. A review of the transcript of the proceeding overwhelmingly reveals numerous errors and inequities, all of which prevented Patrolman Evans from receiving a fair trial.

BY ATTORNEY:

/s/ Charles A. "Sam" Jones,III
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Support of Plaintiff's Appeal has this day been forwarded to David R. Lestage, Attorney for the Defendants.

/s/ Charles A. "Sam" Jones, III
CHARLES A."SAM" JONES, III

C-97-1106

JOHNNY M. EVANS, SR.	:	36TH JUDICIAL DISTRICT COURT
VERSUS	:	PARISH OF BEAUREGARD
DE RIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD	:	STATE OF LOUISIANA
FILED: August 30, 2000	:	s/s Robbie Hennesey DEPUTY CLERK

REASONS FOR JUDGEMENT AFFIRMING BOARD RULING

This matter is before the Court for a judicial review on the petition of Johnny M. Evans, Sr. After reviewing the record and considering the applicable law, the Court has determined that the findings of fact of the Civil Service Board are supported by sufficient competent evidence and, thus, are conclusive for the purpose of this appeal.

Further, this Court has determined that the legal conclusions of the Board of Review, on the facts found, are correct as a matter of law and justify the agency action. Pursuant to the jurisprudence of this State, this Court's jurisdiction is generally limited to questions of

law; the facts found by the Review Board must be accepted as the basis for this judicial review, if those facts are supported by sufficient evidence and in the absence of fraud. The standard for review is noted in Ned v Lake Charles Municipal Fire & Police Civil Service Board., 721 So.2d 577, 581, (La. App. 3 Cir. 1998) :

> "In deciding whether to affirm a Board's factual findings, an appellate court should apply the clearly wrong or manifest error rule. Recasner v Department of Fire, 94-815 (la. App. 4 Cir. 11/17/94) 645 So.2d 1291; Walters v DeQartment of Police of the City of New Orleans, 454 So.2d 106 (La. 1984) ..."

and further, as noted in Montgomery v DeQartment of Streets, 593 So.2d 1352, 1355, (La. App. 4 Cir. 1992) :

> "Generally, a decision of the Civil Service Commission will not be overturned by the appellate court unless it was arbitrary, capricious, or an abuse of discretion."

Further, the standards for the underlying process required in such cases is noted in Cannon v City of Hammond. 727 So.2d 570, 727 (La. App. 1 Cir. 1998) , as follows:

> "Pursuant to Article 10, Section 12 of the Louisiana Constitution, the Hammond Fire and Police Civil Service Board has the exclusive power and authority to hear and decide removal and disciplinary cases involving police officers serving in the City of

> Hammond's classified civil Service. A decision of the Board is subject to review on any question of law or fact appealed to the court of appeal. ...On appellate review, findings of fact of the Board are not to be overturned in the absence of manifest error, and the Board's conclusion as to the existence or absence of cause for dismissal should not be disturbed unless the decision is capricious or an abuse of the Board's discretion. Dumez v Houma MuniciDal Fire & Police Civil Service Board, 408 So.2d 403, 406."

Evans, the appellant in this case was afforded the due process of a full hearing before the local Civil Service Board at which he was represented by counsel, who vigorously asserted appellant's rights and legal positions to the Board. The Board did hear conflicting testimony. The appellant denied having told his son (Johnny M. Evans, Jr.) and a friend (Eric L. Pickens) that Earnest Lee Prater was a police undercover agent. Prater was later the subject of a homicide for which both Evans, Jr. and Pickens were convicted in the 30th Judicial District Court. The countervailing evidence for this is the statement of Pickens himself where he admits his involvement in the death and tells the police that he and Evans, Jr. learned of Prater's informant status from Evans, Sr. This statement by Pickens was

bolstered by a polygraph examination taken of Evans, Sr. as a result of which the polygraphist concluded that Evans, Sr. had not told the entire truth to all of the pertinent questions concerning whether he (Evans, Sr.) had revealed to anyone that Prater was an informant for the police. The Board's findings make it clear that the polygraph examination results were crucial in resolving issues of credibility with respect to the statements made by the witnesses. Determining the weight and credibility of the evidence is clearly within the province of the Board; indeed it is their duty in such cases. Appellant complains that neither the Pickens statement nor the polygraph exam are reliable and should not have been admitted. We disagree.

First, as to the Pickens statement, counsel argues that it violates Rule 10 of the Civil Service Commission's own rules. Though appellant is not specific as to the part of Rule 10 to which he refers, it appears that a violation of Rule 10.6 is urged. It provides:

> "Affidavits and ex-parte statements shall not be received except by consent of the parties unless used to refresh memory or to discredit a witness."

It is the Court's belief that this rule by its wording anticipates that the witness be available to testify, hence the use of "refresh memory" or "discredit" in the exception portion of the rule. The Court also notes that Rule 10.4 provides:

> "The rule of evidence as applied in civil trials before the court of this state need not be strictly complied with, but the board shall limit evidence to the matters having a reasonable relevance to the issues before the board." (Emphasis added)

Counsel for the Board notes correctly in his post hearing memorandum, that when a witness is unavailable under the provisions of La. C.E. 804(B) (3) & {6) such statements are an exception to the hearsay rule and may be admitted.

Pickens was called to testify; he invoked his right against self incrimination under the 5th Amendment of the U. S. Constitution, as he had not yet been tried on criminal charges arising out of the Prater homicide. This made him an unavailable witness under the provisions of La. C.E. Article 804 and his statement, which is clearly against his interest in the admissions that he made and hearsay, is admissible in evidence under the exceptions provided by La. C.E. Article 804(B) and is competent evidence. Further, hearsay is

admissible even without the use of this exception. The Fourth Circuit Court of Appeals noted in Gant v Department of Police, 750 So.2d. 382, 387 {La. App. 4 Cir. 2000) :

> "Further, we fail to find that the proffered testimony was inadmissible on the basis of hearsay. Pretermitting a consideration of whether this testimony constitutes hearsay, we note that the usual rules of evidence do not apply in administrative hearings. Hearsay is admissible..."

That the Board chose to believe this statement by Pickins and not the testimony of Evans, Sr. is their right.

Second, as to the admissibility of the polygraph examination and the expert opinion of the polygraphist, the Court is of the opinion that the Board did not err. While it is true that in criminal cases the admission of polygraph examinations into evidence is not permitted. Appellant's counsel correctly notes that in State v Catanese, 368 So.2d 975, 981 (La. 1979) , the Louisiana Supreme Court held:

> ". ..after considering the evidence in the instant case and studying the authorities and extensive literature in the field, we conclude that it shall be the judicial policy of Louisiana to exclude polygraph evidence in criminal trials at this time."

However, appellant's counsel fails to note that the Louisiana Supreme Court in Catanese goes on to say at page 982:

> "Although we conclude that polygraph evidence is inadmissible in criminal trials, the reasons for our decision do not prevent its introduction in post trial proceedings, within judicial discretion. ... Because the defendant's guilt or innocence is not at issue in such proceedings, there is less demand for the rigorous guarantees of accuracy which typify the rules governing introduction of evidence at trial."

This language clearly suggests that outside of the criminal trial process polygraph evidence is admissible within judicial discretion. Indeed, the Second Circuit noted this distinction in connection with civil cases as noted by counsel for appellee in the case of Rebouche v Anderson, 505 So.2d 808, (La. App. 2 Cir. 1987) , where it noted that while the Supreme Court in Catanese had declared polygraph examinations inadmissible in criminal trials:

> "the language in Catanese indicated that admissibility in proceedings other than criminal trials is largely within the discretion of the trial court" Id at p. 815.

As noted from the citation above of Civil Service Commission Rule 10.4, the rules of evidence to be applied in these hearings are those

applicable to civil trial, not criminal trials. Further, the civil trial rules of evidence "need not be strictly complied with."

The cases cited by the appellant counsel in his post hearing memorandum, including Rebouche above, all involve situations where the reviewing court in its discretion elected to exclude the polygraph examination due to some irregularities peculiar to the case. For example, in the case of Arnold v New Orleans Police DeDartment, 383 So.2d 810, (La. App. 4 Cir. 1980), the police officer and his combatant were so intoxicated that their memory of the events was genuinely not reliable; hence, the Court concluded that the polygraph examination was flawed. The Court of Appeals held that such exclusion was not an abuse of discretion. The issue of the reliability of the polygraph examination in non-criminal cases must be decided on a case by case basis. There does not appear to be any irregularity in the process in the instant case; the conditions appeared to be optimum as required by Catanese.

In a related vein it should also be noted that the Third Circuit Court of Appeals has held in Rowe v State Farm Mutual Auto Ins. Co., 670 So.2d 718, 728 (La.App. 3 Cir. 1996) as follows:

> "As a general rule, the factual basis of an expert's opinion goes to the creditably of the testimony, not its admissibility, and it is up to the opposing party to examine the factual basis of the opinion in cross-examination. Loudermill v Dow Chemical Co., 863 F.2d 566, (8th Cir. 1988) .

This is exactly what occurred at appellant's hearing before the Civil Service Board. The polygraphist was vigorously questioned by both counsel at the hearing in the presence of the Board. The Board obviously weighed his testimony along with that of the appellant and reached their conclusion. The Board's right to weigh the credibility of the witnesses is unquestioned. The Court finds sufficient competent evidence in the record of these proceedings, which, if believed by the Board, is adequate to support their findings by a prepon- derance of the evidence. See Matthews v Department of Police, 723 So.2d 1044, 1047 (La.App. 4 Cir. 1998) :

> "The Appointing Authority has the burden of proving by preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. The appointing authority must also prove the actions complained of bear areal and substantial relationship to the efficient operation of the public service. ..." (Citations omitted)

The Board concluded that appellant revealed the identity of the confidential informant. Such activity greatly impairs the drug undercover activity and makes the recruitment of future undercover agents or informants difficult, as they cannot but question their continued anonymity and safety, given the experience of Earnest Lee Prater in these circumstances. There is no manifest error in the Board's findings nor arbitrary or capricious abuse of discretion in its conclusions. The decision of the Board is affirmed.

Dated, DeRidder, Parish of Beauregard, State of Louisiana, this 26th day of August, 2000.

s/s Stuart S. Kay, Jr., District Judge

COURT OF APPEAL
THIRD CIRCUIT
STATE OF LOUISIANA

APPEAL DOCKET NO. 01-00118-CA

JOHNNY M. EVANS, SR.
Appellant

vs.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD
Appellee

CIVIL APPEAL

ON APPEAL FROM JUDGMENT
OF THE THIRTY-SIXTH JUDICIAL
DISTRICT COURT, IN AND FOR THE
PARISH OF BEAUREGARD,
STATE OF LOUISIANA,
THE HONORABLE STUART S. KAY, JR.
DISTRICT JUDGE
TRIAL DOCKET NO. C-97-1106 A

ORIGINAL BRIEF ON
BEHALF OF APPELLANT
JOHNNY M. EVANS, SR.
BY ATTORNEY:

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Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273

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State v. Schouest, 351 So. 2d 462 (La. 1977)

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State v. Tonubbee, 420 So. 2d 126 (La. 1982)

State v. Davis, 407 So. 2d 702 (La. 1981)

Edmon O. Hines vs. Arkansas Louisiana Gas Company, et al, 613 So. 2d 642 (La. App. 2nd Cir. 1993)

Rebouche v. Anderson 505 So. 2d 808 Ola. App. 2nd Cir. 1987), writ denied 507 So. 2d 228 (La. 1987)

Associates Financial Corporation v. Carrick, 441 So. 2d 1311 (La. App. 2nd Cir. 1983)

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John G. Manale v. Department of Police, 376 So. 2d 607 (La. App. 4th Cir. 1979)

Glenn A. Arnold v. New Orleans Police Department, 383 So. 2d 810 (La. App. 4th Cir. 1980) writ denied June 6, 1980

GROUNDS FOR JURISDICTION

This is an appeal from a final judgment in a civil case. This Court has jurisdiction to decide this appeal based upon Louisiana Constitution Article 5 Section 10(A).

BRIEF STATEMENT OF THE CASE

The appellant, JOHNNY M. EVANS, SR., has been in law enforcement nearly his entire life. He was in the military police for fourteen (14) years while serving in the United States Army, during which, he worked as a military police with a top secret clearance rating. Following his military career, Officer Evans was employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life. In 1997, while employed with the DeRidder City Police Department, it was alleged that Officer Evans disclosed the identity of a confidential informant (Ernest Prater, Jr.) to his son, Johnny Evans Jr., and Eric Pickens. Ernest Prater, Jr., was the victim of a homicide and Johnny Evans, Jr. and Eric Pickens

were later charged and convicted of the homicide of Ernest Prater, Jr., in the 30th Judicial District, Parish of Vernon. A criminal investigation was conducted against the appellant, Johnny M. Evans, Sr., and no evidence was found and he was cleared of any charges. However, his employment was suspended pending a hearing by the Civil Service Board. The Civil Service Board voted to terminate his employment and it is from this ruling that he seeks the review of this Honorable Court.

DETAILED STATEMENT OF FACTS

The Plaintiff, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997. The termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

> "1. Patrolman Evans is a friend of Pickens:
> A. There is no logical reason Eric would makeup such a story on a friend.
> 2. Eric made accusations before he was a suspect and again after becoming a suspect.

3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.

A. Many times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people accused of being Confidential Informants as the suspects are accused of doing. This would indicated that they most likely had a strong confirmation from someone in position to know for Certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.
2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself f rom possible criminal charges.
3. To protect himself from possible civil liability.
4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities; Judges, District Attorney,

etc.

The appellant, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment, see letter from Chief Arvin Malone dated September 25, 1997 (Transcript, Ex. 3). As stated by the examiner, "The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") on the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997. On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Transcript pp. 203-205).

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting evidence which was presented at the hearing by undersigned counsel. Little, if any, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board.

Ultimately, the Board, through their counsel, David Lestage, stated that they relied solely on the results of the polygraph test, wherein it is stated that,

> "**By Mr. Lestage:** "we'll concede that. I mean, that has nothing to do with the matter at hand. This line of questioning is irrelevant. If the Commission will turn to the top of page three of the discharge letter, it says, "Because of the seriousness and nature of the accusation, officer Evans was ordered to submit to a polygraph examination in order to boost the credibility of the accused and/or accuser." **That's what we're here about**. We're not here about Eric

Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and it not - - certainly for Chief Malone to decide now, nor to have decided on October 29, and we'd object to this line of questioning."

By Mr. Jones: "Mr. Chairman, again his argument is inconsistent with the letter. The letter of termination says: **We're relying on the credibility of Pickens.** His argument flies in the face of that, and they're trying to squirm away from it as hard as they can; because he's a liar, and we've caught him lying every time he's turned around in these statements. And this termination letter says: **We are relying on the credibility of Pickens and the polygraph**. But now, since its very inconvenient to rely on the credibility of Pickens because he's lying everywhere, they want to just rely on the polygraph. And I ask you not to let them do that. I ask you to let me explore the inconsistencies so I can get them on the record".

Chairman Williams: We're kind of wandering way off too far.

Mr. Jones: I only have one other question in this line, and I'll move on after that, Mr. Chairman.
Q. (Mr. Jones) Are you aware that, in his statement to Detectives Hagan and Smith, Eric Pickens indicates on page ten that he does not Know J.J. Johnson?

Mr. Lestage: Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

Chairman Williams: Sustained

Mr. Jones: I can't get into this other lie to show this last inconsistency, Mr. Chairman?

Chairman Williams: No, sir.

Mr. Jones: Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a question in order to complete my proffer.

Chairman Williams: Okay.
Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?
A. I was aware there was some involvement there. I don't know all

of the details on it, but I was aware that there was some transaction there somehow.

Mr. Jones: That completes my proffer on that question, Mr. Chairman."

Appellant, Johnny M. Evans, Sr., contends that his termination was without **good faith and cause** and it is from the Board's decision that he sought review from the 36th Judicial District Court.

On December 29, 1997, the undersigned counsel filed a Notice of Appeal with the Secretary of the Board. The Appeal, together with a transcript of the hearing and all exhibits were forwarded to Honorable Stuart S. Kay, Jr., District Judge of the 36th Judicial District Court for a determination of this matter in a summary manner.

On August 30, 2000, Hon. Stuart S. Kay, Jr., affirmed the decision of the Board (Transcript pp. 29-34). Further, a Judgment was signed in Chambers on October 9, 2000 (Transcript p. 35).

LAW

Louisiana Revised Statute 33:2561 sets forth the appeal process in Civil Service Hearings, it is from this statute that appellant, JOHNNY M. EVANS, SR., sought documentary review with the 36th Judicial District Court and further seeks review from this Honorable Court, the 3rd Circuit Court of Appeals.

The above statute allows for the appellate court to review an administrative disciplinary decision against public employee. However, this review is limited to the determination of whether the decision was made in good faith and for legal cause. The decision must of the Board must be affirmed unless the record contains insufficient evidence or shows that the decision was clearly wrong.

Additionally, and only in the event that it is found that the decision of the Civil Service Board was made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and

Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that sufficient evidence is synonymous with "competent" evidence. The decision of the Civil Service Board of the City of DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir.).

Further, the issue of whether the decision of the appointing authority or of the Board was "made in good faith for cause" is construed to mean that the action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a proceeding challenging termination of a civil service employee is

by a preponderance of the evidence. Although the facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board., 688 So. 2d 112 (La. App. 5 Cir.)

In the recent case United States v. Edward G. Scheffer, 118 S. Ct. 1261 (U.S. S.Ct. 1998) , the United States Supreme Court held "**There is simply no consensus that polygraph evidence is reliable**." Consistent with the Scheffer case, Louisiana Courts have excluded such evidence in both civil and criminal cases.

In State vs. Catanese, 368 So. 2d 975 (La. 1979) , the Court ruled that:

". . . after considering the evidence in the instant case and studying the authorities and extensive literature in the field, we conclude that it shall be the **judicial policy of Louisiana** to exclude polygraph evidence in criminal trials at this time."

The Court further stated in Catanese that:

". . . Our fundamental concern is that the trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion. . . extensive procedural safeguards should be established either by court rule or legislation before the introduction of polygraph tests at trial. . . . In our judgment there has not yet been enough judicial experience with polygraph evidence in Louisiana to provide an adequate basis for judicial rule making on this scale".

After a full reconsideration of the problem of lie detector evidence, the Court in State v. Hocum, 456 So. 2d 602 (La. 1984) declared it to be the judicial policy of Louisiana to exclude, for any purpose, polygraph evidence in criminal trials. The principal reasons for such exclusion were stated to be (1) the propensity of triers of fact to give conclusive weight to the polygraph expert's opinion; (2) The lack of a regulatory program for maintaining an adequate level of examiners' ability, experience, education, integrity and availability and (3) The need

for procedural rules and safeguards governing the introduction of polygraph evidence. State v. Catanese, supra at 981. See also State v. Whitmore, 353 So. 2d 1286 (La. 1978); State v. Davis, 351 So. 2d 771 (La. 1977); State vs. Schouest, 351 So. 2d 462 (La. 1977); State v. Weeks, 345 So.2d 26 (La. 1977); State v. Governor, 331 So. 2d 443 (La. 1976); State v. Corbin, 285 So. 2d 234 (La. 1973); State v. Refuge, 270 So. 2d 842 (La. 1972). ". . . Subsequently, this court made it clear that the Catanese rule excluding polygraph evidence for any purpose from criminal trials also operates to prevent any reference during trial to the fact that a witness has taken a polygraph examination with respect to the subject matter of his testimony. State vs. Tonubbee, 420 So. 2d 126 (La. 1982); State v. Davis, 407 so. 2d 702 (La. 1981).

CIVIL JURISPRUDENCE

In Edmon O. Hines vs. Arkansas Louisiana Gas Company, et al, 613 So. 2d 642 (La. App. 2nd Cir. 1993) the court agreed that ". . . results of a polygraph examination would

be inadmissable", the court ruled that a plaintiff could present testimony concerning his offer to take the test . Furthermore, the exclusion of such evidence in civil cases has been consistently upheld on appeal. Rebouche v. Anderson, 505 So. 2d 808 Ola. App. 2nd Cir. 1987), writ denied 507 So. 2d 228 (La. 1987); Associates Financial Corporation v. Carrick 441 So. 2d 1311 (La. App. 2nd Cir. 1983). Indeed, the federal Fifth Circuit Court of Appeal has noted adherence to an unequivocal rule of exclusion, making no exception for civil cases, even in instances where the polygraph results are purportedly offered for a purpose other than asserting the truth of the statements contained therein. See Barrel of Fun, Inc. v. State Farm Fire & Casualty, 739 F.2d 1028, 1031 (5th Cir. 1984); Smith v. Gonzales, 670 F. 2d 522, 528 (5th Cir. 1982), cert. denied, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed. 2d 397 (1982). ". . . the foremost reason for disallowing such evidence rests with its exaggerated, prejudicial effect upon the triers of fact". In Accord, E. Clearly, McCormick's Handbook on the Law of Evidence, 207 at page

507 (2d E. 1972), it states that present-day jurors, despite their sophistication and increased education levels and intellectual capabilities, are still likely to give significant, if not conclusive, weight to such evidence. U.S. v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975). In the case before this Honorable Court, the Civil Service Commission for the City of DeRidder relied strictly on the polygraph evidence and affirmed the termination of Officer Johnny M. Evans accordingly.

In John G. Manale vs. Department of Police, 376 so. 2d 607 (La. App. 4th Cir. 1979), the New Orleans Civil Service Commission used the rule from a criminal case (no polygraph evidence is admissible) and applied it to its' administrative case. The Fourth Circuit Court of Appeals upheld this application. In Manale, the Court relied on the authority of State v. Corbin, 285 So. 2d 234 (La. 1973) and found that the polygraph test was inadmissable and concluded that the City's case had to stand or fall without the results of the test.

In Glenn A. Arnold v. New Orleans Police Department, 383 So. 2d 810 (La. App. 4th Cir. 1980) writ denied June 6, 1980, a Civil Service Commission case similar to the instant case wherein an Officer was terminated from his employment, it was the Court's ruling that the Civil Service Board did not err in refusing to accept results of polygraph test. ". . . Excluding the results of the polygraph tests, the question remains whether the evidence in the record supports the appointing authority's action by a preponderance of the evidence".

Notwithstanding the propriety of the polygraph, the test results alone or the test results coupled with the unsupported suggestions and assertions of Chief Arvin Malone's termination letter are insufficient to support the Commissions actions. Previous actions of Appellant are also inconsistent with the allegations. On or about June or July, 1997, JOHNNY M. EVANS, contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due his son's possible involvement in drug activity. Officer Evans advised these officers that his son was

beginning to have expensive things and he didn't feel as if he was making that much money at his present job. Officer Evans asked them if they would check him out to see if he was involved with drugs (Transcript p. 38).

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VERIFICATION OF ORIGINAL BRIEF ON APPEAL

STATE OF LOUISIANA

PARISH OF BEAUREGARD

BEFORE ME, the undersigned Notary Public, personally came and appeared CHARLES A. "SAM" JONES, III, who, being by me first duly sworn, did depose and say that he is the attorney for the applicant in the above and foregoing brief on appeal and all facts contained therein are true and correct to the best of his knowledge, information, and belief, and that a copy of

this original brief on appeal has been served upon the David R. Lestage, counsel for the Defendant and the Honorable Stuart S. Kay, Jr., presiding judge, by delivering the same to them on this the 26th day of February, 2001.

/s) Charles A. "Sam" Jones, III
CHARLES A. "SAM" JONES, III

SWORN TO AND SUBSCRIBED before me, Notary Public, on this 26th day of February, 2001.

/s/ Shana M. Singletary
NOTARY PUBLIC

A-50

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT
P.O. Box 16577
Lake Charles, LA 70616
(337) 433-9403

David Ramsey Lestage **NOTICE OF JUDGMENT**
Hall, Lestage & Landreneau
P.O. Box 880
DeRidder, LA 70634

REHEARING ACTION: Augut 8, 2001

Docket Number: 01 00118-CA

JOHNNY M. EVANS, SR.
VERSUS
DERIDDER MUNICIPAL FIRE &
POLICE CIVIL SERVICE BOARD

Appealed from BEAUREGARD Parish Case No. C-97-1106 A

BEFORE JUDGES:

Hon. Sylvia R. Cooks
Hon. Billie Colombaro Woodard
Hon. Jimmie C. Peters

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by DeRidder Municipal Fire & Police Civil Service Board has this day been

DENIED

FOR THE COURT

Kenneth J. deBlanc
Clerk of Court

cc: Charles A. Sam Jones, III, Counsel for the Appellant

COURT OF APPEAL
THIRD CIRCUIT
STATE OF LOUISIANA

APPEAL DOCKET NO. 01-00118

JOHNNY M. EVANS, SR.
Plaintiff - Appellant

v.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA
Defendants - Appellees

APPEAL FROM THE THIRTY-SIXTH JUDICIAL DISTRICT COURT,PARISH OF BEAUREGARD, STATE OF LOUISIANA

HONORABLE STUART S. KAY JR. - PRESIDING JUDGE

OPPOSITION TO DEFENDANT'S APPLICATION FOR RE-HEARING

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OPPOSITION TO DEFENDANT'S APPLICATION FOR RE-HEARING

I.) The City of DeRidder first suggest that reliance by this Honorable Court of Appeals on U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed. 2D 413 (1998) erroneously excludes polygraph evidence, per se; that such evidence was properly admitted.

This argument erroneously presumes exclusive reliance upon United States vs. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L. Ed. 2d 413 (1998). To the contrary, the polygraph results/demarcations and Mr. Trahan's interpretation of the same were correctly defined as an attack on Patrolman Evans' credibility, "based on particular acts - his responses to Mr. Trahan's questions", and thus, inadmissible under Louisiana. Code of Evidence Article 608(A) and (B).

In reviewing the action of the Civil Service Commission in this case, this Honorable Appellate Court found it unnecessary to consider, in depth, the substance of the polygraph test. Had

such been necessary, the record is replete with evidence of the unreliability of the same. The testimony of the polygrapher is riddled with conclusions drawn from physiological reactions of Patrolman Evans, requiring, at a minimum, a degree of medical training.

> Q. ". . . In connection with your licensing to become a polygrapher, did you receive any medical training or education?
>
> A. No, sir." (Tr. p. 160, ll. 9-12).

Further, the polygrapher had a total lack of knowledge as to the inner functions of the machine he used (Tr. p. 129 ll 10-19).

Assuming, arguendo, that it had been necessary to further examine the substance of the testimony given by the polygrapher, ample justification exists for its exclusion.

> " . . . if an expert opinion is so fundamentally unsupported that it can offer, no assistance to the jury, then the testimony should not be admitted at all." Rowe vs. State Farm, 670 So. 2d 718 (La. App. 3 Cir. 1996) citing

Viterlo v. Dow Chemical Co., 826 F. 2d 420 (5th Cir. 1987).

II. The City of DeRidder asserts that this Honorable Court erred in finding only one statement of Eric Pickens was admitted at the Civil Service Hearing and that **the statement was untrustworthy**.

Eric Pickens declined to testify at the Civil Service Commission Hearing and asserted a Fifth Amendment privilege against self-incrimination (Tr. p. 53, ll. 3-10). After this assertion, counsel for the City of DeRidder chose **not** to have the Chairman direct Mr. Pickens to testify, notwithstanding the fact that the testimony sought was not inculpatory.

The previous ruling by this Honorable Appellate Court would apply to one or both statements made by Mr. Pickens. Further, this Honorable Court accurately noted the inconsistencies of Mr. Pickens' hearsay statements, both of which are inconsistent and unworthy. Simply put, they are statements made by a suspect of a murder, who, at the time, was

attempting to lead law enforcement away from his guilt.

In its application for rehearing, the City of DeRidder simply chooses to ignore certain inconsistencies previously noted by this Court.

III. The City of DeRidder asserts this Honorable Court erred in reviewing the Civil Service Boards admission of the Pickens' statements as being 1) unjustified and 2) contrary to Rule 10.4 of the Munciple Fire & Police Civil Service Board of DeRidder, Louisiana.

The City of DeRidder suggest that the statements of Eric Pickens were inculpatory as providing "motive" for Pickens' involvement. However, "motive" was not an element of proof for the State of Louisiana in its criminal charges against Mr. Pickens.

Further, the City of DeRidder made a tactical decision at the hearing to refrain from having the Chairman direct Mr. Pickens to answer questions posed to him. As the questions did not elicit inculpatory information, the City would have been well within its right to ask that the witness be directed to answer.

Mr. Pickens' hearsay statements would certainly have not be admissible had the City of DeRidder chose to make him testify at Patrolman Evans' hearing. The City of DeRidder now seeks to capitalize on its mistakes by consideration of evidence riddled with inconsistency and not subject to cross-examination.

This case is not proper for remand. The City of DeRidder seeks another "bite at the apple". This request would be made by all parties/appellees who are dissatisfied with appropriate appellate evidentiary assessments or the lack thereof.

There must be sufficient evidence to support this administrative decision. City of Abbeville v. Abbeville Fire and

Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308. It is respectfully submitted that sufficient evidence is synonymous with "competent" evidence. Incompetent evidence should not be considered on appeal. Ruddock v. Jefferson Parish Fire Civile Service Board, 688 So. 2nd 112 (La. App. 5th Cir. 1997) and George v. Department of Fire, 637 so. 2d 1097 (La. App. 4th Cir. 1994).

Appellant, JOHNNY M. EVANS, SR., respectfully request that the Request for Rehearing filed on behalf of the Defendants, DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER be dismissed.

Respectfully submitted:

/s/ Charles a. "Sam" Jones, III
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing OPPOSITION TO DEFENDANT'S-APPELLEES FOR REHEARING has been forwarded to counsel for defendants, David R. Lestage, Attorney at Law at 207 W. 2nd Street, P.O. Box 880, DeRidder, Louisiana 70634 , and an original and four 94) copies of the aforementioned opposition has been duly served upon Honorable Kenneth J. deBlanc, Clerk of the Third Circuit Court of Appeals, P.O. Box 16577, Lake Charles, Louisiana 71616 by mailing the same, postage pre-paid and properly addressed.

DeRidder, Louisiana, this 16th day of July, 2001.

/s/ Charles A. "Sam" Jones, III
CHARLES A. "SAM" JONES, III

Judgment rendered June 27, 2001.
Application for rehearing may be filed
within the delays allowed by La. Code Civ.
P. art. 2166 or La. Code Crim.P. art. 922.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

01-118

JOHNNY M. EVANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE &
POLICE CIVIL SERVICE BOARD

****

APPEAL FROM THE
THIRTY -SIXTH JUDICIAL DISTRICT COURT
PARISH OF BEAUREGARD, NO. C-97-1106 A
HONORABLE STUART s. KA Y , JR., DISTRICT JUDGE

****

BILLIE COLOMBARO WOODARD
JUDGE

****

Court composed of Sylvia R. Cooks, Billie Colombaro Woodard, and Jimmie C. -Peters, Judges.

REVERSED.

J David Ramsey Lestage
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COUNSEL FOR PLAINTIFF/APPELLANT:
Johnny M. Evans, Sr.

WOODARD, Judge.

The Mayor of the City of DeRidder, Louisiana, tenninated Patrolman Johnny M. Evans, Sr ., from the police force on October 31, 1997. Patrolman Evans appealed to the DeRidder Municipal Fire and Police Civil Service Board (the Board), which upheld the Mayor's decision. Then, he appealed to the Thirty-Sixth Judicial District Court, which upheld the Board. He files the instant appeal, maintaining that the polygraph examination results should not have been admitted into evidence and that they substantially influenced the Board's decision.

We find that the trial court erred in upholding the Board's decision to admit the evidence. Accordingly, we reverse and restore Patrolman Evans to his position with back pay and allowances.

*****

On August 25, 1997, Mr. Johnny M. Evans, Jr. (Johnny), Patrolman Evans, Sr.'s son, and Mr. Eric Pickens killed Mr. Earnest Prater, Jr. Apparently, the killing occurred because the decedent had given the police department information which had led to Mr. Pickens' arrest for a drug-related offense.

Prior to finding Mr. Prater's killers, Mr. Pickens indicated to DeRidder law enforcement, on August 28, 1997, that he might have information about a motive in the murder. He told Sergeant John Gott, Lieutenant Ricky Johnson, and Sergeant Kenny Pine that, when he was at Patrolman Evans' home the previous week, Patrolman Evans told him that Mr. Prater worked for the police and had "busted" Mr . Pickens and another person.

During DeRidder Chief ofPolice, Arvin Malone's, investigation of this claim, he asked Patrolman Evans to take a polygraph test, which Patrolman Evans initially refused. Ultimately, ChiefMalone ordered him to comply or to be terminated. After Patrolman Evans took the test, the polygrapher opined that he had not told the entire truth on all of the pertinent questions; i.e., those related to whether he had divulged confidential information to unauthorized people. Upon receiving the polygrapher's report, Chief Malone recommended

Patrolman Evans' dismissal, effective October 31, 1997. Mayor Gerald Johnson approved the recommendation.

Patrolman Evans appealed to the Board. After a hearing on December 18, 1997, substantially relying on the polygrapher's testimony, the Board unanimously found that the alleged violation had occurred and that the appointing authority (the Mayor) had acted in good faith and for cause. Patrolman Evans appealed to the Thirty-Sixth Judicial District Court, which affirmed the Board's decision on October 9,2000. He files the instant appeal, seeking his reinstatement and claiming that the trial court erred when upholding the Board's decision to admit the polygrapher's expert opinion into evidence.

*****

DISMISSAL OF CIVIL SERV ANTS

An employee, who has gained permanent status in the classified city civil service, cannot be subjected to his employer's disciplinary action, including dismissal, except for cause.1 When determining "cause" for discharge, the Louisiana Supreme Court, in *Waiters v. Department of Police of the City of New Orleans,*[2] set forth "' [c]ause ' for the dismissal of a person who has gained permanent status in the classified civil service has been interpreted to include conduct prejudicial to the public service in which the

employee in question is engaged or detrimental to its efficient operation." In *Bannister v Department of Streets*,[3] the supreme court further elaborated on its *Waiters'* requirements, holding that "disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is areal and substantial relationship between the improper conduct and the 'efficient operation' of the public service."

A dismissal of a civil servant "for cause" is synonymous with legal cause.4 Namely, "[l]egal cause for disciplinary action exists if the facts found by the commission disclose that the conduct of the employee impairs the efficiency of the

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[1]La.Const. art. X, § 8(A).

[2]454 So.2d 106, 113 (La. 1984).

[3]95-404, p. 8, (La. 1/16/96); 666 So.2d 641,647.

[4] *Appointing Authority, Chief of Police for the City of Kenner v. Trippi,* 499 So.2d 1177 (La.App. 5 Cir. 1986); *City of Westwego v. McKee,* 448 So.2d 166 (La.App. 5 Cir. 1984), *writ denied,* 503 So.2d 22 (La. 1987).

public service."s La.R.S. 33 :2561 allows a public employee to apply to the Board for review of a discharge or disciplinary action. This statute limits the Board to "the question of whether the action taken against the employee was made in good faith for cause."

The burden of proving legal cause is on the appointing authority -in this case, the Mayor of DeRidder, Louisiana.6 Thus, the Mayor must demonstrate, by a preponderance of the evidence, that the conduct did, in fact, impair the public service's efficiency and orderly operation. It is the Board's duty to decide whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction. The Board has an obligation to uphold the Mayor's disciplinary action ifit finds sufficient cause.[7]

La.R. S .33 :2561 (E) further provides that the employee may appeal the Board's decision and that the court shall hear and determine the appeal in a summary manner. Similar to the requirements imposed upon the Board, La.R.S. 33:2561(E) mandates that the district court's review be "confined to the determination of whether the decision made by the board was made in good faith for cause[.]" On appeal, when reviewing the Board's findings of fact, we must apply the manifest error standard to factual findings and then consider

whether the action of the court is arbitrary, capricious, or an abuse of discretion.[8]

The Mayor has the burden of proving his case by a "preponderance of the evidence." The Board's findings must be based on *competent* evidence, as appellate courts will not consider incompetent evidence on review .[9] Although, we must find the facts to have been clearly established, they need not have been proven beyond a "reasonable doubt," as in a criminal case. It is beyond question that if Patrolman Evans revealed the name of a confidential informant

[5] *Appointing Authority, Chief of Police for the City of Kenner* , 499 So.2d at 1180 (citing *Leggett v. Northwestern State College,* 242 La. 927,938, 140 So.2d 5, 9 (1962)). *See also, Ruddock v. Jefferson Parish Fire Civil Serv. Ed.*, 96-831, p. 2 (La.App. 5 Cir. 1/28/97); 688 So.2d 112, 114.

[6] *Id.*

[7] *Id.*

[8] *Walters,* 454 So.2d 106.

[9] *George v. Department of Fire,* 93-2421 (La.App. 4 Cir. 5/17/94); 637 So.2d l 1097.

to those unauthorized to possess such information, sufficient legal cause would exist to terminate his employment. However, we must decide whether the Board's evidence was *competent* and sufficient. Specifically, among other evidentiary issues, we must determine, apparently for the first time in our circuit, whether polygraph examination results are admissible in civil proceedings. The crux of the Mayor's case consisted of the polygrapher's report and testimony. Mr. Calvin Trahan administered the test, interpreted the results, and, originally, sent his report to Chief Malone. After receiving it, Chief Malone terminated Patrolman Evans. In turn, the Board considered the report, during the I termination hearing, over Patrolman Evans' counsel's vigorous challenge. The trial court upheld the Board's admission, finding that the exclusion of polygraph evidence in criminal trials' did not, *per se,* require its exclusion in other proceedings.

PRELIMINARY CONSIDERATIONS ON POLYGRAPH

Although the trial court misapplied *Catanese*[10] in support of its admission of the evidence, it correctly recognized that polygraph results, generally, are inadmissible in criminal trials.[11] This hard line is understandable, as there, simply, is no consensus that polygraph evidence is reliable.[12] In fact, the scientific community remains extremely polarized about polygraph techniques' reliability.

[11] *OState* v. *Catanese,* 368 So.2d 975 (La. 1979). *!!Id.*

[12] *U.S.* v. *Scheffer,* 523 U.S. 303, 118 S.Ct. 1261(1998). *!3Id.* at 1265 n.6.

Furthermore, assuming that "the basic debate about the reliability of polygraph technology itself were resolved, however, there would still be controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus 'fool' the polygraph machine and the examiner."[13]

The machine "simultaneously and continuously measures and records . . . physiological reactions on a graph or chart (polygram). Respiration is measured by pneumatic tubes attached to the subject's chest and abdomen; cardiovascular activity is measured by a blood pressure cuff (Sphygmomanometer) strapped around his upper arm or wrist and forearm; and perspiration (galvanic skin response) is measured by electrodes that are attached to the subject's fingertips."[14]

While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners. ..affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. ' Although an adequate instrument is essential for proper testing, the

role of the examiner in interviewing the examinee, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.' Thus, the skill of examiners fundamentally affects the ultimate reliability of the test."[15]

However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, *there is no scientifically proven cause and effect connection between an increase in the pertinent physiological reactions and "truth telling.* " Indeed, some authors noted that "[t]he heart of the present critique of the polygraph is that *no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.* Furthermore, there is 'no known physiological response that is unique to deception, , and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is

[14] Lisa A. Bonsignore, *The Employee Polygraph Protection Act of* 1988: *Assessing the Validity of Banning Pre-Employment Screening of Job Applications,* 6 J. SUFFOLKAcAD. L. 159, fu. 10 (1989).

[15] Yvonne Koontz Sening, *Heads or Tails: The Employee Polygraph Protection Act,* 39 CATH.U.L. REv. 235,264 (1989) (footnotes omitted).

impossible to predict the conditions under which polygraph test results will be accurate or inaccurate.[16]

Until now in Louisiana courts, "the foremost reason for disallowing such evidence rests with its exaggerated, prejudicial effect upon the triers of fact.[17] [18] This is motivated by the experience that "'present-day jurors, despite their sophistication and increased education levels and intellectual capabilities, are still likely to give significant, if not conclusive, weight' to such evidence, [19]"[20] which is obviously what happened in the case *sub judice*.

Generally, trial judges have a gatekeeping function and vast discretion when 1 determining whether to admit expert testimony . However, the expert's opinion must be based upon correct assumptions of facts and supported by the record.[22] Additionally, the expert's testimony must be both reliable and relevant.[23] "[A]n expert is one who, usually by education or experience, has a *unique* lmowledge of the subject matter at issue[.][24] It is appropriate to admit reliable, relevant expert testimony when the expert has *specialized* knowledge to assist the trier of fact in its fact-finding function.[25]

[16] Leonard Saxe and Gershon Ben-Shakhar, *Admissibility of Polygraph Tests the Application of Scientific Standards Post-Daubert,* 5 PSYCHOL. PUB. POL 'Y & L 203,219 (1999) (citation omitted) (emphasis added).

[17] (Citing in accord, E. C1eary, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, § 207 at 507 (2d. 1972».

[18] *Hines v. Arkansas La. Gas Co.,* 613 So.2d 646,650 (La.App. 2 Cir. 1993), *writ denied,* 617 So.2d 932 (La. 1993).

[19] (Citing *US. v. Alexander,* 526 F.2d 161, 168 (8th Cir. 1975).

[20] *Hines* 613 So.2d at 650.

[21] *See Tullis v. Rapides Parish Police Jury,* 95-905 (La.App. 3 Cir. 1/17/96); 670 So.2d 245, *writ not considered,* 96-444 (La. 3/29/96); 670 So.2d 1241.

[22] *Id.*

[23] *Sandell v. Hooter,* 96-1062 (La.App. 3 Cir. 2/26/97); 692 So.2d 474, *writ denied,* 97-801 (La. 5/1/97); 693 So.2d 730.

[24] *Barrett v. J:L. James & Co.,* 28,170, p. 12 (La.App. 2 Cir. 4/3/96); 671 So.2d 1186, 1194, *writ denied,* 96-1124 (La. 6/7/96); 674 So.2d 973 (emphasis added).

[25] La:Code.Evid. art. 702, *see State v. Bosworth,* 593 So.2d 1356, 1360 (La.App. 4 Clr.), *wrIt denIed,* 600 So.2d 658 (La. 1992).

The polygraph has been coined as a "lie-detector ." In other words, its very purpose serves to determine whether a person is telling the truth. In our legal system, this function is precisely within the trier of fact's role. In fact, we call upon fact finders to use their personal life experience, common knowledge, and intuition to determine credibility -whether a litigant or witness is telling the truth. Impliedly, we treat our fact finders as "experts" in the truth telling arena and give the utmost respect to their ultimate findings. This respect, conferred upon the trier of fact, further permeates our entire legal system. Indeed, courts of appeal are constrained not to overturn a fact finder's credibility determination, absent finding that it committed a manifest error. For example, in *Darbonne v. Wal-MartStores Inc.*,[26] we summarized the manifest error rule as follows:

> The reviewing court must give great weight to the factual conclusions of the trial court. Manifest error is the standard used by appellate courts to resolve conflicting factual evidence. This means that where a reasonable factual basis exists for those findings, they should not be disturbed by the appellate court in the absence of manifest error . A court of appeal may set aside a trial court's or a jury's finding of fact if it finds that there was manifest error or if the decision was clearly wrong. If the trial court or jury findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if it is convinced that had it been si tting as the trier of fact, it would have weighed the evidence differently.
>
> For the reviewing court, the issue to be resolved is not whether the trier offact was wrong but whether the factfinder's conclusions were reasonable. Thus, where there is a conflict in the testimony, the trial

> court's reasonable *evaluations of credibility* and reasonable inferences of fact should not be disturbed upon review even if the appellate court may feel that its own evaluations and inferences are as reasonable.

(Emphasis added.)

Obviously, determining "the truth" is sacred ground which we have, traditionally, reserved for the fact finder. Allowing an "an expert" in "lie-detecting" to testify as to whether a witness is telling the truth imports the danger to supplant, rather than assist, the fact finder in its major function. Indeed, permitting this to take place promises that a litigant will use such an

[26] 00-551, pp. 3-4 (La.App. 3 Cir. 11/2/00); 774 So.2d 1022, 1025-26 (citations [: omitted).

"expert," in rebuttal, to verify the credibility of his/her witnesses attacked, as well as to assail the opponent's case by providing "expert" testimony that the opponents' witnesses are "lying."

ADMISSIBILITY OF POLYGRAPH EVIDENCE

From a purely evidentiary standpoint, we find polygraph evidence to be", inadmissible. Essentially, polygraph testimony amounts to credibility determinations, impliedly based on character for truthfulness. Our code of evidence, as do the Federal Rules of Evidence, provides that character evidence is generally inadmissible to show that the person acted accordingly .[27]

Louisiana Code of Evidence Article 404(A)(3) describes an exception to this general rule, concerning a witness ' character, under La. Code Evid. arts. 607, 608 and 609. Article 609, which imparts an exception to attacking credibility by admitting evidence of criminal conviction in civil cases, does not apply to the circumstances *sub judice.* However, Article 607(A) sets forth general rules to attack and support credibility. First, it states that "[t]he credibility of a witness may be attacked by any party, including the party calling him." However, it distinguishes intrinsic and extrinsic evidence when providing guidelines for admissibility.

Intrinsic evidence is generally admissible to attack the credibility of a

witness. Article 607(C) states that "a party ...mayexamine [the witness] concerning any matter having a reasonable tendency to disprove the truthfulness or accuracy of his testimony."

Regarding extrinsic evidence admissibility, Article 607(D) provides:

Except as otherwise provided by legislation:

(1) Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness.

(2) Other extrinsic evidence, including prior inconsistent statements and evidence contradicting the witness' testimony, is admissible when offered solely to attack the credibility of a witness unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice.

[27] La.Code Evid. art. 404.

Article 608 specifies distinctive factual circumstances and modalities to admit extrinsic evidence. For example, La.Code Evid. art. 608(A) provides for the admissibility of"[r]eputation evidence of character"; Article 608(8) for "[p]articular acts, vices or courses of conduct"; and Article 608(C) for "[c]ross-examination of character witnesses." Particularly relevant to the case *sub judice,* La.Code Evid. art. 608(A) states that "[t]he credibility of a witness may be attacked or supported by evidence in the form of general reputation *only[.]"* (Emphasis added.) Further, concerning specific instances of conduct, La.Code Evid. art. 608(8) provides that "[p]articular acts, vices, or courses of conduct of a witness *may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness,* other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required." (Emphasis added.)

In the case *sub judice,* the Mayor introduced the polygraph test's results and the polygraph expert's testimony, both extrinsic evidence by definition, to directly attack Patrolman Evans's credibility; namely, to prove that he lied when he said that he did not divulge Mr. Prater's identity as an informant to any unauthorized person; i.e., his son and/or Mr. Pickens. The demarcations, which the polygraph machine made, *per se,* are meaningless. And, essentially, Mr. Trahan' s interpretation of them, I along with his concomitant testimony,

amount to an attack on Patrolman Evans' , credibility, based on particular acts - his responses to Mr. Trahan ' s questions.

Accordingly, we find Mr. Trahan's testimony and the test results to be inadmissible under La.Code Evid. art. 608(A) and (8), as neither, the testimony nor , the results, constitutes "[r]eputation evidence of character." Specifically, Mr. Trahan's opinion, grounded in his interpretation of Patrolman Evans' physiological and verbal responses to his questions, is not an opinion regarding Patrolman Evan's character for truthfulness or untruthfulness based on his *reputation* in the community.

Indeed, even if a link could be established between physiological responses and deceit, ascertaining a person's truthfulness on a specific occasion and in the form of, a few questions is not tantamount to addressing one's *character or reputation* for truthfulness. Indeed, in *United States* v. *Scheffer,* [28] the United States Supreme Court stated that "an expert polygrapher's interpretation of polygraph results. ..is merely

[28] 523 U.S. at317,~18 S.Ct. at 1268,n.13 (1998).

the opinion of a witness with no knowledge about any of the [relevant] facts. .. concerning whether the [witness] spoke truthfully or deceptively on another occasion." Furthermore, assuming that the polygrapher had wished to testify as to Patrolman Evan's character or reputation for truthfulness, rather than give his interpretation of the polygraph results and of Patrolman Evans' specific answers to some of his questions, he would not have been qualified to do so, as he failed to demonstrate a personal knowledge in that regard.

Accordingly, the trial court erred when it upheld the Board's decision to admit the Mr. Trahan's testimony and polygraph results.

Although our determination on this issue appears to be *res nova* in Louisiana, there is support for it in Federal Court's decisions.[29]

DE Novo REVIEW

Having found a legal error in the Board's and trial court's decisions to admit the polygraph results and the polygrapher's testimony into evidence, we conduct a *de novo* review of the record's remaining evidence to determine whether it sufficiently supports the Board's findings and action.

Excluding the polygraph-related evidence, the Mayor's case consists of Patrolman Evans' sworn testimony, denying that he had revealed Mr. Prater's name to anyone who was unauthorized Johnny or Mr. Pickens -contradicted by

an unsworn statement, transcribed from what Mr. Pickens purportedly related to law enforcement.

Patrolman Evans' counsel objected to the statement's admissibility. We are mindful of the fact that Mr. Pickens opted to "take the fifth" at Patrolman Evans' board hearing, as opposed to testifying, thus making him technically unavailable under La. Code Evid. art. 804(A). It is well settled that when a declarant is unavailable under La. Code Evid. art. 804(A), her/his hearsay statement, nevertheless, may be admitted into evidence if it fits within one of the six hearsay exceptions designated under La.Code Evid. art. 804(B).

[29] *Maddox* v. *Cash Loans of HuntsvilleII,* 21 F.Supp.2d 1336 (N.D.Ala. 1998); *see United States* v. *Sanchez-Robles,* 927 F.2d 1070 (9thCir. 1991); *see also, Scheffer,* 523 U.S. 303,118 S.Ct. 1261; *United States* v. *Pitner,* 969 F.Supp 1246 (W.D. Wash.1997).

At first glance, only two of those exceptions could prove applicable to Mr . Pickens' statement. First, La. Code Evid. art. (804)(B)(3) provides an exception to the hearsay rule in the case of a "[s]tatement against interest." However, we do not find this exception applicable, because although Mr. Pickens' statement, as a whole, may have been against his penal interest, to some extent, under *Williamson* v. *United States,*[30] as adopted in Louisiana by *State* v. *Smith,*[31] and *State* v. *Anthony,*[32] the part of his statement involving Patrolman Evans was not self-inculpatory. Thus, it was inadmissible.

Second, La. Code Evid. art. (804)(B)(6), a catchall provision, provides in relevant part, that a hearsay statement may be admissible when "[i]n a civil case, a statement not specifically covered by any of the foregoing exceptions if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy[.]" We note two crucial contradictions in Mr. Pickens' statement concerning Patrolman Evans having divulged a confidential informant. Mr . Pickens stated that Johnny did not mention names. Instead, "He [Johnny] said some niggers on Bishop told me that Ernie [Prater] was the one ratting us out." Not only does this underscore a critical inconsistency, but it also demonstrates that there could have been another source for his information other than Patrolman Evans.

Additionally, Mr. Pickens discredited himself concerning the circumstances under which Patrolman Evans imparted the information. In one instance, he claimed that upon arriving at their house, he heard Patrolman Evans talking to his son about Mr. Prater's identity. Yet, another time, he said that Johnny was not present when Patrolman Evans gave Mr. Pickens the information.

Accordingly, we find that Mr. Pickens' purported accounts are so inconsistent on core issues regarding Patrolman Evans' alleged violation that they lack total credibility and trustworthiness. Thus, his statement should not have been admitted

[30] 512 U.S. 594, 114 S.Ct. 2431 (1994).

[31] 94-1221,94-1222,94-1223 (La. 10/7/94); 643 So.2d 1221.

[32] 97-91 (La.App. 3 Cir. 6/4/97); 695 So.2d 1142, *writ denied,* 97-1774 (La. 11/26/97); 703 So.2d 645. li

under La.Code Evid. 804(B)(6), and the trial court erred when it denied Patrolman Evans' objection to that effect.

This leaves us with Patrolman Evans' testimony and Chief Malone's conjecture. The gist of Chief Malone's theory dealt with his belief that Patrolman Evans revealed the information in order to protect his son from arrest for drug usage and because Mr. Pickens was a friend. However, Patrolman Evans' history of behavior does not support Chief Malone's theory. Quite the contrary. The record reveals that Patrolman Evans has never tried to shield Johnny or any family member from criminal prosecution and, in fact, has been completely forthright and aggressive by taking immediate potentially punitive action in that regard. For example, he initiated an investigation ofhis son, which could have caused his arrest. Specifically, when he suspected him of drug dealing, he contacted the police and asked them to investigate. He also helped them to search his car and told his fellow officers that "if they had to put him (Johnny) in jail ...they had a job to do. But I did not want him on the street selling drugs." He remarked that he would have assisted them in arresting his son, if needed.

In another incident, he suspected a nephew, who was living with him at the time, of being involved with drugs. He contacted Sergeant Pine, who was

in charge of the DeRidder Police Department, and summoned a drug detecting dog unit to search his house. The search yielded crack cocaine.

Betty Rose Pichon, Deputy Sheriff with the Beauregard Parish Sheriff s Office, fundamentally and unequivocally confirmed Patrolman Evans' testimony regarding both incidents.

If anything, his exemplary behavioral history speaks just the opposite of a man who would do anything to protect his son from a drug arrest.

Based on this record, we conclude that the Board did not possess sufficient "cause" to terminate him. Accordingly, we restore him to his former position with back pay and allowances.

CONCLUSION

The district court erred in affirming the Board's decision to uphold Patrolman Evans' termination. We reverse, holding that the Board abused its discretion in admitting the polygraph examination results and Mr. Trahan ' s testimony. We restore Patrolman Evans to his former position, with back pay and allowances, and cast the City, to the extent allowed by law, with costs, in the amount of $734.25.

REVERSED.

SUPREME COURT OF LOUISIANA

****

NO. 2001-C-2466

****

JOHNNY M. EVANS, SR.
Plaintiff - Respondent

v.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD
and THE CITY OF DERIDDER, LOUISIANA
Defendants - Applicant

****

OPPOSITION OF JOHNNY M. EVANS, SR., TO DEFENDANT'S APPLICATION FOR SUPERVISORY WRITS OF REVIEW TO THE COURT OF APPEAL, THIRD CIRCUIT

****

CIVIL CASE

****

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STATEMENT OF THE CASE

The respondent, JOHNNY M. EVANS, SR., has been in law enforcement a majority of his entire life. He served twenty-two (22) years in the United States Army, in which he was in the military police for fourteen (14) years. During this time, he had a top secret clearance rating. Following his military career, Officer Evans was

employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life.

On or about June or July, 1997, Johnny M. Evans, Sr., contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due to his son's possible involvement in drug activity. Officer Evans advised these officers that his son was beginning to have expensive things and he didn't feel as if he was making that much money at his present job. Officer Evans asked them if they would check him out to see if he was involved with drugs (Tr. p. 38). In another incident, he suspected a nephew, who was living with him, of being involved with drugs. He contacted Sergeant Pine of the DeRidder City Police, and summoned a drug detecting dog unit to search

his house. The search yielded crack cocaine.

Respondent, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997. The termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

> "1. Patrolman Evans is a friend of Pickens:
> A. There is no logical reason Eric would makeup such a story on a friend.
> 2. Eric made accusations before he was a suspect and again after becoming a suspect.
> 3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.
> A. Many times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people Accused of being Confidential Informants as

the suspects are accused of doing. This would indicate that they most likely had a strong confirmation from someone in position to know for certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.
2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself f rom possible criminal charges.
3. To protect himself from possible civil liability.
4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities,

Judges, District Attorney, etc.

The respondent, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment. (see letter from Chief

Arvin Malone dated September 25, 1997 (Tr. Ex. 3). As stated by the examiner,

"The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") challenging the employment termination of Officer Johnny M. Evans, Sr.

A hearing was scheduled for December 18, 1997. On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Tr. pp. 203-205). Johnny Evans, Sr. appealed to the District Court, which affirmed the Board's decision. Johnny Evans, Sr. appealed to the Third Circuit Court of Appeal which reversed the ruling of the District Court.

DEFENDANT'S ASSIGNMENT OF ERROR NO. 1:

The Third Circuit, erred in relying upon United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) and Louisiana Code of Evidence Articles 607 and 608, rather than State v. Catanese, 363 So.2d 975 (La. 1979) and Louisiana Code of Evidence

Articles 701 through 704, thereby resulting in exclusion of polygraph evidence per se in such a civil, administrative proceeding as existed here; rather, the polygraph evidence in this case was properly admitted and supports the District Court's affirming of the dismissal from employment of Johnny M. Evans, Sr.

OPPOSITION TO ASSIGNMENT OF ERROR NO. 1

On December 18, 1997, a hearing was conducted to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr.

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting

evidence which was presented at the hearing by the undersigned counsel. **Little, if any**, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from Chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board. Ultimately, the Board, through their counsel, David Lestage, **stated that they relied solely on the results of the polygraph test** (Tr. p. 82 lines 18-21):

MR. LESTAGE

"Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired."

At the hearing, counsel for the City of DeRidder offered hearsay statements of Eric Pickens, into evidence,

over objection, alleging disclosure of the identity of a confidential informant by Officer Evans. These statements were allowed in evidence. Counsel for Mr. Evans then sought to show the myriad inconsistencies and inaccuracies of these statements. In response, counsel for the City of DeRidder objected, frequently, alleging that these statements were irrelevant .

The City of DeRidder now argues that these same statements constitute substantive evidence sufficient to justify Officer Evans termination.

Respondent has contended through all levels of this proceeding, i.e., Civil Service Hearing, District Court Documentary Review, Third Circuit Court of Appeals, and now to the Honorable Supreme Court of Louisiana, that his termination was without **good faith and cause.**

In order for the decision of the Civil Service Board

to be found to have been made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that **sufficient evidence** is synonymous with "**competent**" evidence. The decision of the Civil Service Board of the City of DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir.).

Further, the issue to be determined by the Board or by the District Court, in the event an appeal is taken to that Court, is whether the decision of the appointing authority or of the Board was "made in good faith for

cause" is construed to mean that the action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a proceeding challenging termination of a civil service employee is by a preponderance of the evidence. The facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5 Cir.)

It is respectfully submitted that conflicting and contradictory hearsay statements do not qualify as

"compentent" evidence. Further, movant contends and the Third Circuit Court of Appeals agreed in their decision, that having found legal error in the Board's and Trial Court's decision to admit the polygraph results and the polygrapher's testimony into evidence, a determination must be made as to whether or not there is sufficient evidence to support the Board's actions. The Third Circuit Court of Appeals stated "Based on this record, we conclude that the Board **did not possess sufficient "cause" to terminate him."**

DEFENDANT'S ASSIGNMENT OF ERROR NO. 2:

The Court of Appeal, Third Circuit, erred in relying upon United States v.

Scheffer 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) and Louisiana Code of Evidence Articles 607 and 608, rather than State v. Catanese, 368 So.2d 975 (La. 1979) and Louisiana Code of Evidence Articles 701 through 704, thereby resulting in exclusion of polygraph evidence per se in such a civil, administrative proceeding as existed here; rather, the polygraph evidence in this case was properly admitted and supports the District Court's affirming the dismissal from employment of Johnny M. Evans, Sr.

OPPOSITION TO ASSIGNMENT OF ERROR NO.2:

> "Nothing in Daubert foreclosed, as a constitutional matter, per se exclusionary rules for certain types of expert or scientific evidence" United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 975 (La. 1975). **[Emphasis Added]**

This same rationale should apply to jurisprudence, as the United States Supreme Court concluded (in

footnote 7):

> "[i]t would be an odd inversion of our heirarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution" Scheffer, Id.

However, in the event a per se exclusion of such evidence is subordinated to a case by case review, this record is extremely deficient of facts requisite to admissibility. The Third Circuit Court of Appeals obviously observed these inadequacies in the record.

Concerning the qualifications of the test administrator, the record is absent evidence that Mr. Trahan had previously qualified as an expert, or that a substantive portion of his income is derived through polygraphy.

In determining whether the expert is proposing to testify to opinion based on scientific knowledge, the record must include an inquiry into the evidentiary

relevance and reliability of the principles that underline a proposed submission. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993).

Such factors include:

a.) What is the known or potential rate of error? Daubert, @ p. 2797

b.) What standards exist to control the techniques operation? Daubert, @ p. 2797

c.) Can the hypothesis be and has it been tested? Daubert, @ p. 2796

d.) Has the theory or technique been subjected to peer review and publication? Daubert, @ p. 2797

e.) What is the degree of acceptance of the technique within the relevant community? Daubert, @ p. 2797

While the polygraphist in this case submitted an unbelievable rate of error of one (1%) percent, the most

telling disclosure was that this rate of error is not verifiable.

> "Q. Have you ever made a mistake in any of these five or six hundred polygraph examinations you've conducted?
> A. Yes, sir, I have.
> Q. And about how many?
> A. Well, verifiable would be difficult; but I would say the number would be between five and ten." (Tr. p. 136 lines 8-13)

This record is somewhat silent on the existence of standards to control the techniques operation. Likewise, it is respectfully submitted that there are no established procedural safeguards which would safeguard the administration of the polygraph. The machine used on Officer Evans was the Auther VI (Tr. p. 125), which, according to the polygraphist is not in general use.

> "Q. And was the polygraph used for the examination of Mr. Evans an instrument in general use?
>
> A. Well, it's not an instrument in

> general use, because Dick Arther has polygraphs made to his specific - - to his specifications, as opposed to nowadays you can get them that's computerized and people go with computer. You can get polygraphs that are electronically enhanced. The Arther VI that I use is not electronically enhanced. In other words, the recording is an actual recording from the person; it is not enhanced to get a better reading off of it." (Trans. p. 124 lines 21-25 and p. 125 lines 1-5)

The most notable disclosure by this polygraphist was a total lack of Knowledge as to how his machine (Arther VI) functioned.

> "Q. You're not an engineer of any kind?
>
> A. No, sir, I'm not.
>
> Q. Electric engineer or anything of that sort?
>
> A. No, sir.
>
> Q. And you didn't build this

polygraph?

A. No, sir, I did not.

Q. And you don't know, from an engineering standpoint, what makes that part of it work?

A. I am not an electronic engineer; I don't know what makes it work" (Tr. p. 129 lines 10-19).

Yet, notwithstanding this total lack of knowledge of the inner functions of the Arther VI, this polygraphist performs his own repairs when his machine malfunctions or breaks.

"Q. You indicated, in response to Mr. Lestage's questions, you're not an engineer. You don't know how that machine works, it's inner - - I mean, you don't know its inner functioning. You couldn't take it apart and put it back together.

> A. Well, I don't say I couldn't do that, because I do my own repairs. But as far as taking - - looking at the little transformer and know why that transformer does all this, no. But if there's something wrong with my polygraph, I generally fix it myself. If that transformer needs changing, I'll order a new one and change it. But as far as what makes the transformer, you know, affect the components inside, no" (Tr. p. 161 lines 18-26, p. 162 lines 1-3).

The paradigm in the State of Louisiana is the use of the Intoxilyzer 5000 for determination of intoxication. It can be presumed that few, if any, officers administering the Intoxilyzer 5000 know the inner functions of this machine or how to repair it, although they are certified to administer the test. Consistent with its widespread use, the State established extensive safeguards, through the

Louisiana Registry, (Title 55 Public Safety), for the use, maintenance, calibration and admissibility of test results. The machine must be calibrated with a known sample within four (4) months of administration of a test to be used in evidence at trial, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 501) and a certificate issued and filed in the records of the Clerk of Court in the judicial district in which the test is administered. Each inspector must be periodically re-certified, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 507). These safeguards apply to detection of blood alcohol content, a much more exacting science than determining the veracity of statements made by a test subject.

Yet, this record is silent on the existence of any such rules or regulations for the Arther VI.

This polygraphist disclosed other factors

suggestive of the abstract, inexact and subjective nature of polygraphy.

1. "Q. We'll get to that in a minute. One other thing I want to touch on that you just gave in your explanation. So now you're telling me that during this test or to arrive at your conclusions, you relied on body language and demeanor of Johnny Evans.

   A. Well, it has - - It has some - - It has some play in it; but the bottom line is the chart - - is the chart analysis." (Tr. p. 167 lines 15-21)

2. "Q. And further, you stated, and I'll quote, "A positive truthful person would possibly have answered.., "quote, " I will pass because I know I did not do this thing," unquote, "etcetera." So what I'm getting to is, obviously, "should do good" is not a positive response in that, Mr. Trahan?

   A. Well, no, it's not a positive response. You know, I'm going to pass this," is going to be a positive response." (Tr. p. 172 lines 2-6)

3. " . . . He swallowed at that particular point. That's a sign of relief from a person that was stressed by the particular question

- -" (Tr. p. 157 lines 7 - 9)

4. " . . . the liar will tend to rate the olygraph on the low end of the scale. A truthful person would tend to rate it on a higher end of the scale . . . " (Tr. p. 131 lines 22-24)

5. " . . .when a questions places him under stress and they are thinking about their heart rate increasing and everything, they're going to change their Breathing; and it's going to have a direct - - reflect directly down on the heart - - " (Tr. p. 149 lines 13-17) **(Emphasis Added)**

6. " . . .Mr. Evans, in my opinion did not tell the entire truth on this particular issue" (Tr. p. 146 lines 1-12) **(Emphasis Added)**

7. "Q . . . I want to revisit one question. Can you distinguish between partial truths and lies on your test?"

A. No, absolutely no." (Tr. p. 164 lines 21-23)

8. "Q. He interpreted the question to mean that you were indicating he was telling you lies on all questions up to that point."

A. No; he didn't give me any indication of that. He didn't - - - Normally, when a

> person feels that way, they'll look at me and say: What, you're calling me a liar? And then I have to explain to them: No, no, no; I'm not calling you a liar; what I'm trying to do is to get theses areas in your past out of they way so there's no - - - something don't show up on the chart that could be misinterpreted as that question." (Tr. p. 179 lines 2-4)

As stated by the Honorable Third Circuit Court of Appeals:

> "While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners . . . affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. 'Although an adequate instrument is essential for proper testing, the role of the examiner in interviewing the examinee, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.'

Thus, the skill of examiners fundamentally affects the ultimate reliability of the test.

However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, **there is no scientifically proven cause and effect connection between an increase in the pertinent physiological reactions and "truth telling."** Indeed, some authors noted that "[t]he heart of the present critique of the polygraph is that **no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.** Furthermore, there is 'no known physiological response that is unique to deception,' and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, Heads or Tails: The Employee Polygraph Protection Act, 39 CATH.U.L. REV. 235, 264 (1989)

This record answers the remaining Daubert, Id. r

requisites in much the same manner. "There is simply no

consensus that polygraph evidence is reliable". United States v.Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed. 2d 975 (La. 1975)

The opinion of the polygraphist is also subject to the balancing test set forth in Louisiana Code of Evidence Article 403.

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

Officer Evans was terminated from his employment solely as a result of the polygraph results.

MR. LESTAGE:

> ". . . Counsel misses the point. Mr. Evans was o ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired." (Tr. p. 82 lines 19-21)

MR. LESTAGE:

> ". . . I object to that. He asked - - He ordered the man, Mr. Evans, Sr., to undergo a polygraph examination to help in that determination. If the man had passed, he'd still be on force and on salary. I mean, it's that simple." (Tr. p. 115 lines 1-6)

It is not a difficult transition to consider the test result having identical conclusive effect with the members comprising the Civil Service Board at Officer Evans' hearing.

DEFENDANT'S ASSIGNMENTS OF ERROR 3,4&5

3: The Court of Appeal, Third Circuit, erred in finding that only one statement of Eric Pickens incriminating Johnny M. Evans, Sr., was admitted at the Civil Service Hearing and that accounts therein were so inconsistent as to evidence lack of credibility and trustworthiness on the part of Eric Pickens so as to justify

reversal of the termination of employment of Johnny M. Evans, Sr.

4: The Court of Appeal, Third Circuit, erred in determining that the Boards admission fo the two statements of Eric Pickens implicating Johnny M. Evans, Sr., was not justified pursuant to Louisiana Code of Evidence Article 804, paragraph B(3) or (6), or alternatively Article 101. As well as administrative Rule 10.4 of the said Board.

5: The Court of Appeal, Third Circuit, erred in failing to remand this matter to the District Court with instructions that it remand same to the Board to reopen the evidence so that the City of DeRidder can present testimony of Eric Pickens since his conviction of manslaughter in the death of Earnest Prater, Jr., is final and he can no longer refrain from testifying by relying

upon the privilege against self-incrimination afforded by the Fifth Amendment of the United States Constitution and/or La. Constitution Article 1 Section 16.

OPPOSITION TO ASSIGNMENT OF ERROR NO. 3, 4 & 5:

The hearsay statements of Eric Pickens contain a plethora of inconsistencies. These inconsistencies were, in part, disclosed during Officer Evans' termination hearing (although strenuously objected to by counsel for the City of DeRidder as being irrelevant). Simply put they are the statements of an individual who participated in a murder, made to feign cooperation with law enforcement, cast another party with involvement, and possible revenge for Officer Evans arresting him on August 14 (Tr. p. 87, lines 13-17). As noted by the Honorable Third Circuit Court of Appeals, the statements

contain, at a minimum, two (2) crucial contradictions. Many others, however, exist.

In the statement given on August 28, 1997, Mr. Pickens made no mention of being a participant in the murder of Ernest Prater. Additionally, he stated that Johnny Evans, Jr., was not present when this disclosure was made.

Next, in his statement given on August 31, 1997, Mr. Pickens disclosed that the information came from Johnny Evans, Jr.:

> "Q. Okay, who told uh, who told that Ernest was ratting people out or . . . ?
>
> A. Johnny.
>
> Q. How did he know?
>
> A. He said those dudes on Bishop told him.
>
> Q. On Bishop?

A. He didn't say no names. He said some niggers on Bishop told me that Ernie was the one ratting us out.

Q. He never told you nobody else at any time, had he . . he had learnt . . that Ernest, that was the first that you knew Ernest was ratting?

A. Yeah, then I went over there and him and his daddy was talking about it."

The pronoun "him" used in this last statement can only refer to Johnny Evans, Jr., who was the individual being discussed in pp. 1-8 of that statement. Thus, Johnny Evans, Jr., revealed that this information came from "those dudes on Bishop" street. Further, this statement was made at a location other than the home of Johnny Evans, Sr., as Mr. Pickens indicated, "Yeah, then I went over there . . . "

In the questioning of Police Chief Arvin Malone, it was revealed that Eric Pickens had made an undercover

purchase of drugs from J.J. Johnson.

MR. LESTAGE:

"Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

CHAIRMAN WILLIAMS:

Sustained.

MR. JONES

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

CHAIRMAN WILLIAMS

No, sir.

MR. JONES

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a questions in order to complete my proffer.

CHAIRMAN WILLIAMS:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware

that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

MR. JONES:

That completes my proffer on that question, Mr. Chairman".(Tr. p. 107 lines 1-25 and p. 108 l 1)

Yet, in his statement of August 31, 1997, Mr. Pickens indicated a lack of knowledge of J.J. Johnson.

"Q. Just you there. And he told you that , he had turned you and several more . . . J.J., who is he referring to as J.J.?

A. It's a dude named J.J. I don't know him, though."

Accordingly, it is respectfully submitted that the Honorable Third Circuit Court of Appeals correctly found these statement to lack credibility and trustworthiness.

Louisiana Code of Evidence Article 804 (B) 3 provides an exception to the hearsay rule for statements against interest. Mr. Pickens' statement on August 28, 1997 to Officer Johnson, Pine and Gott did not subject him to criminal liability. It is not a statement against his interest. At no time during that statement did he profess to be a participant in or have distinct knowledge of the murder of Ernest Prater. Additionally, its inconsistency with the later statement given on August 31, 1997 gravitates toward inadmissibility under the hearsay exception provided by Article 804 (B)6.

As to the admissibility of the statement given on August 31, 1997, the United States Supreme Court, in Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431 (1994), held that the term "statement" in Federal Rule 804(B)(3), does not refer to an extended declaration

such as a report or narrative in its entirety. Louisiana Code of Evidence Rule 804(B)(3) is identical to the federal counterpart.

> "The fact that a person is making a broadly self-inculpatory statement does not make more credible the confessions non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth . . . " Williamson, Id. 2 p. 2435.

The Williamson, Id. majority held that the Rule did not authorize admission of non-self-inculpatory statements made during the course of another's confession. This Honorable Court adopted the Williamson rationale in State v. Smith, 643 So. 2d. 1221 (La. 1994) Subsequently, this interpretation was followed in State v. Coates, 661 So. 2d 571 (La. App. 2nd Cir. 1995), wherein the declarant implicated himself in the crime but attempted to place the ultimate blame on the

defendant.

Finally, the City of DeRidder urges the remand of this matter for rehearing due to the conclusion of criminal proceedings against its previously "unavailable" witness. In urging the admissibility of these statements under Article 804(B)(3) the City of DeRidder should concede that the portions pertinent to this proceeding were not "self-inculpatory". The Fifth Amendment, asserted by Pickens at the Civil Service hearing, does not protect against non-inculpatory statements or disclosures. The City of DeRidder had the right and/or obligation to request that the Chairman direct the witness to answer the questions relevant to that hearing, notwithstanding the witnesses urgence of the Fifth Amendment privilege against self incrimination. They chose not to do so. Nor would live testimony by Mr. Pickens negate the existence

of inconsistencies and contradictions which rendered his hearsay statement untrustworthy. As counsel for the City of DeRidder astutely pointed out during this hearing,

> ". . .We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and its not - - certainly not for Chief Malone to decide now, nor to have decided on October 29. And we'd object to this line of questioning." (Tr. p. 105 lines 17-25, p. 106 lines 1-2)

CONCLUSION

Officer Johnny Evans, Sr., was a member of the United States Army for twenty-two (22) years and was honorably discharged at the rank of E-7, Sergeant First Class. He was classified with a top secret clearance rating for the last eighteen (18) of those years (Tr. p. 48, lines 13-14). After two (2) years with the Beauregard Parish Sheriff's Office, he joined the force of the DeRidder City

Police on April 5, 1993. While with the DeRidder City Police he reported his own family members to the Beauregard Parish Narcotics Task Force for possible drug involvement. His exemplary record itself contradicts the allegations made against him. It is respectfully and humbly requested that this Court deny the requested Writs applied for by the City of DeRidder.

BY ATTORNEY:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Support of Plaintiff's Appeal has this day been forwarded to David R. Lestage, Attorney for the Defendants.

/s/ Charles A. "Sam" Jones, III
CHARLES A. "SAM" JONES, III

(3)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY M. EVANS, SR.

Petitioner

versus

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

APPENDIX - VOLUME II

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182 pp

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THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHNNY M. EVANS, SR. NO. 2001-C-2466

VS.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD

IN RE: Deridder Municipal Fire & Police Civil Service Board et al; Deridder, City of ; - Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Beauregard, 36th Judicial District Court Div. A, Nos. C-97-1106; to the Court of Appeal, Third Circuit, No. 01-118

December 14, 2001
Granted. See Order Attached

PFC
CDK
BJJ
JPV
CDT
RLL

Supreme Court of Louisiana
December 14, 2001
/s/ Illegible
Clerk of Court, Chief Deputy for the Clerk

SUPREME COURT
STATE OF LOUISIANA

NO. 2001-C-2466

JOHNNY M. EVANS, SR.
Plaintiff - Appellant
v.
DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD
and THE CITY OF DERIDDER, LOUISIANA
Defendants - Appellees

PLAINTIFF/APPELLANT'S ORIGINAL BRIEF ON THE MERITS WRIT OF REVIEW TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF BEAUREGARD

CIVIL CASE

RESPECTFULLY SUBMITTED:
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OPPOSITION TO DEFENDANT'S WRIT OF REVIEW

STATEMENT OF THE CASE

The respondent, JOHNNY M. EVANS, SR., has been in law enforcement a majority of his entire life. He served twenty-two (22) years in the United States Army, in which he was in the military police for fourteen (14) years. During this time, he had a top secret clearance rating. Following his military career, Officer Evans was employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life.

On or about June or July, 1997, Johnny M. Evans, Sr., contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due to his son's possible involvement in drug activity. Officer Evans advised

these officers that his son was beginning to have expensive things and he didn't feel as if he was making that much money at his present job. Officer Evans asked them if they would check him out to see if he was involved with drugs (Tr. p. 38). In another incident, he suspected a nephew, who was living with him, of being involved with drugs. He contacted Sergeant Pine of the DeRidder City Police, and summoned a drug detecting dog unit to search his house. The search yielded crack cocaine.

Respondent, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997 for allegedly disclosing information concerning the identity of a drug informant, Earnest Prater, to his son, Johnny Evans, Jr. and Eric Pickens. The

termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

"1. Patrolman Evans is a friend of Pickens:

A. There is no logical reason Eric would makeup such a story on a friend.

2. Eric made accusations before he was a suspect and again after becoming a suspect.

3. It is apparent Eric and Johnny Evans, Jr., knew of Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.

A. Many times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people Accused of being Confidential Informants as the suspects are accused of doing. This would indicate that they most likely had a strong confirmation

from someone in position to know for certain what Prater's connection was with Law Enforcement. Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.

   A. Knew son was suspected of possible drug activities.

2. To protect Eric Pickens from possible arrest.

   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.

2. To protect himself from possible criminal charges.

3. To protect himself from possible civil liability.

4. To protect himself from possible administrative sanctions.

5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities, Judges, District Attorney, etc.

The respondent, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment. (see letter from Chief Arvin Malone dated September 25, 1997 (Tr. Ex. 3). As stated by the examiner, "The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") challenging the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997.

On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Tr. pp. 203-205). Johnny Evans, Sr. appealed to the District Court, which affirmed the Board's decision. Johnny Evans, Sr. appealed to the Third Circuit Court of Appeal which reversed the ruling of the District Court. Defendant applied to the Supreme Court for a Writ of Review which was granted and briefing schedules were set.

ARGUMENT
OPPOSITION TO ASSIGNMENT OF ERROR NO. 1:

On December 18, 1997, a hearing was conducted to determine if the termination of Officer Johnny M.

Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr.

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting evidence which was presented at the hearing by the undersigned counsel. **Little, if any**, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from Chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board. Ultimately, the Board, through their counsel, David Lestage, **stated that they relied solely on the results of the polygraph test** (Tr.

p. 82 lines 18-21).

MR. LESTAGE

> "Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired."

At the hearing, counsel for the City of DeRidder offered hearsay statements of Eric Pickens, into evidence, over objection, alleging disclosure of the identity of a confidential informant by Officer Evans. These statements were allowed in evidence. Counsel for Mr. Evans then sought to show the myriad inconsistencies and inaccuracies of these statements. In response, counsel for the City of DeRidder objected, frequently, alleging that these statements were irrelevant .

The City of DeRidder now argues that these same statements constitute

substantive evidence sufficient to justify Officer Evans' termination.

Respondent has contended through all levels of this proceeding, i.e., Civil Service Hearing, District Court Documentary Review, Third Circuit Court of Appeal, and now to the Honorable Supreme Court of Louisiana, that his termination was without **good faith and cause.**

In order for the decision of the Civil Service Board to be found to have been made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that **sufficient evidence** is synonymous with "**competent**" evidence. The decision of the Civil Service Board of the City of

DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir. 1997).

Further, the issue to be determined by the Board or by the District Court, in the event an appeal is taken to that Court, is whether the decision of the appointing authority or of the Board was "made in good faith for cause" is construed to mean that the action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a

proceeding challenging termination of a civil service employee is by a preponderance of the evidence. The facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board, supra.

It is respectfully submitted that conflicting and contradictory hearsay statements do not qualify as "competent" evidence. Further, Movant contends and the Third Circuit Court of Appeal agreed in their decision, that having found legal error in the Board's and Trial Court's decision to admit the polygraph results and the polygrapher's testimony into evidence, a determination must be made as to whether or not there is sufficient evidence to support the Board's actions. The Third Circuit Court of Appeal stated "Based on this

record, we conclude that the Board **did not possess sufficient "cause" to terminate him."**

OPPOSITION TO ASSIGNMENT OF ERROR NO. 2:

A) "Nothing in Daubert, infra., foreclosed, as a constitutional matter, per se exclusionary rules for certain types of expert or scientific evidence" United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (La. 1998). (emphasis added).

This same rationale should apply to jurisprudence, as the United States Supreme Court concluded (in footnote 7):

> "[i]t would be an odd inversion of our heirarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution" Scheffer, supra.

However, in the event a per se exclusion of such evidence is preferred over a case by case review, this record is extremely deficient of facts requisite to

admissibility. The Third Circuit Court of Appeals obviously observed these inadequacies in the record.

Concerning the qualifications of the test administrator, the record is absent evidence that Mr. Trahan had previously qualified as an expert, or that a substantive portion of his income is derived through the use of polygraphs.

In determining whether the expert is proposing to testify to opinion based on scientific knowledge, the

record must include an inquiry into the evidentiary relevance and reliability of the principles that underline a proposed submission. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993).

Such factors include:

a.) What is the known or potential rate of error? Daubert, @ p. 2797

b.) What standards exist to control the techniques operation? Daubert, @ p. 2797

c.) Can the hypothesis be and has it been tested? Daubert, @ p. 2796

d.) Has the theory or technique been subjected to peer review and publication? Daubert, @ p. 2797

e.) What is the degree of acceptance of the technique within the relevant community? Daubert, @ p. 2797

While the polygraphist in this case submitted an unbelievable rate of error of one (1%) percent, the most telling disclosure was that this rate of error is not

verifiable.

"Q. Have you ever made a mistake in any of these five or six hundred polygraph examinations you've conducted?

A. Yes, sir, I have.

Q. And about how many?

A. Well, verifiable would be difficult; but I would say the number would be between five and ten." (Tr. p. 136 lines 8-13)

This record is somewhat silent on the existence of standards to control the techniques operation. Likewise, it is respectfully submitted that there are no established procedural safeguards which would safeguard the administration of the polygraph. The machine used on Officer Evans was the Arther VI (Tr. p. 125), which, according to the polygraphist is not in general use.

"Q. And was the polygraph used for the examination of Mr. Evans an instrument in general use?

A. Well, it's not an instrument in general use, because Dick Arther has polygraphs made to his specific - - to his specifications, as opposed to nowadays you can get them that's computerized and people go with computer. You can get polygraphs that are electronically enhanced. The Arther VI that I use is not electronically enhanced. In other words, the recording is an actual recording from the person; it is not enhanced to get a better reading off of it." (Trans. p. 124 lines 21-25 and p. 125 lines 1-5)

The most notable disclosure by this polygraphist was a total lack of knowledge as to how his machine (Arther VI) functioned.

"Q. You're not an engineer of any kind?

A. No, sir, I'm not.

Q. Electric engineer or anything of that sort?

A. No, sir.

Q. And you didn't build this polygraph?

A. No, sir, I did not.

Q. And you don't know, from an engineering standpoint, what makes that part of it work?

A. I am not an electronic engineer; I don't know what makes it work" (Tr. p. 129 lines 10-19).

Yet, notwithstanding this total lack of knowledge of the inner functions of the Arther VI, this polygraphist performs his own repairs when his machine malfunctions or breaks.

"Q. You indicated, in response to Mr. Lestage's questions, you're not an engineer. You don't know how that machine works, it's inner - - I mean, you don't know its inner functioning. You couldn't take it apart and put it back together.

A. Well, I don't say I couldn't do that, because I do my own repairs. But as far as taking - - looking at the little transformer and know why that transformer does all this, no. But if there's something wrong with my polygraph, I generally fix it myself. If that transformer needs changing, I'll order a new one and change it. But as far as what makes the transformer, you know, affect the components inside, no" (Tr. p. 161 lines 18-26, p. 162 lines 1-3).

The paradigm in the State of Louisiana is the use of the Intoxilyzer 5000 for determination of intoxication.

It can be presumed that few, if any, officers administering the Intoxilyzer 5000 know the inner functions of this machine or how to repair it, although they are certified to administer the test. Consistent with its wide spread use, the State established extensive safeguards, through the Louisiana Registry, (Title 55 Public Safety), for the use, maintenance, calibration and admissibility of test results. The machine must be calibrated with a known sample within four (4) months of administration of a test to be used in evidence at trial, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 501) and a certificate issued and filed in the records of the Clerk of Court in the judicial district in which the test is administered. Each inspector must be periodically re-certified, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 507). These safeguards apply to detection of blood alcohol content, a much

more exacting science than determining the veracity of statements made by a test subject.

Yet, this record is silent on the existence of any such rules or regulations for the Arther VI.

This polygraphist disclosed other factors suggestive of the abstract, inexact and subjective nature of polygraphs.

1. "Q. We'll get to that in a minute. One other thing I want to touch on that you just gave in your explanation. So now you're telling me that during this test or to arrive at your conclusions, you relied on body language and demeanor of Johnny Evans.

   A. Well, it has - - It has some - - It has some play in it; but the bottom line is the chart - - is the chart analysis." (Tr. p. 167 lines 15-21)

2. "Q. And further, you stated, and I'll quote, "A positive truthful person would possibly have answered.., "quote, " I will pass because I know I did not do this thing,"

unquote, "etcetera." So what I'm getting to is, obviously, "should do good" is not a positive response in that, Mr. Trahan?

A. Well, no, it's not a positive response. You know, I'm going to pass this," is going to be a positive response." (Tr. p. 172 lines 2-6)

3. " . . . He swallowed at that particular point. That's a sign of relief from a person that was stressed by the particular question - -" (Tr. p. 157 lines 7 - 9)

4. " . . . the liar will tend to rate the polygraph on the low end of the scale. A truthful person would tend to rate it on a higher end of the scale . . . " (Tr. p. 131 lines 22-24)

5. " . . . when a questions places him under stress and they are thinking about their heart rate increasing and everything, they're going to change their breathing; and it's going to have a direct - - reflect directly down on the heart - - " (Tr. p. 149 lines 13-17) **(Emphasis Added)**

6. " . . .Mr. Evans, in my opinion did not tell the entire truth on this particular issue"

(Tr. p. 146 lines 11-12) (**Emphasis Added)**

7. "Q . . . I want to revisit one question. Can you distinguish between partial truths and lies on your test?"

   A. No, absolutely no." (Tr. p. 164 lines 21-23)

8. "Q. He interpreted the question to mean that you were indicating he was telling you lies on all questions up to that point."

   A. No; he didn't give me any indication of that. He didn't - - - Normally, when a person feels that way, they'll look at me and say: What, you're calling me a liar? And then I have to explain to them: No, no, no; I'm not calling you a liar; what I'm trying to do is to get theses areas in your past out of they way so there's no - - - something don't show up on the chart that could be misinterpreted as that question." (Tr. p. 179 lines 2-4)

As stated by the Honorable Third Circuit Court of Appeal:

"While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners . . . affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. 'Although an adequate instrument is essential for proper testing, the role of the examiner in interviewing the examinee, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.' Thus, the skill of examiners fundamentally affects the ultimate reliability of the test.

However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, **there is no scientifically proven cause and effect connection between an increase in the pertinent physiological reactions and "truth telling."** Indeed, some authors noted that "[t]he heart of the present critique of

> the polygraph is that **no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.** Furthermore, there is 'no known physiological response that is unique to deception,' and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, *Heads or Tails: The Employee Polygraph Protection Act,* 39 CATH.U.L. REV. 235, 264 (1989); Johnny M. Evans, Sr. v. DeRidder Municipal Fire & Police Civil Service Board, State of Louisiana, Court of Appeal, Third Circuit, Docket No. 01-118.

This record answers the remaining Daubert, supra, requisites in much the same manner. "There is simply no consensus that polygraph evidence is reliable". United States v. Scheffer, supra.

The opinion of the polygrapher/polygraphist is also

subject to the balancing test set forth in Louisiana Code of Evidence Article 403.

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

This is the additional basis considered by the Third Circuit, which the City of DeRidder disregards in suggesting that the opinion formulates a per se exclusion, considering ONLY Louisiana Code of Evidence Articles 607, 608 and U.S. v. Scheffer, supra.

Officer Evans was terminated from his employment solely as a result of the polygraph results.

MR. LESTAGE:

> ". . . Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired." (Tr. p. 82 lines 19-21)

MR. LESTAGE:

> ". . . I object to that. He asked - - He ordered the man, Mr. Evans, Sr., to undergo a polygraph examination to help in that determination. If the man had passed, he'd still be on force and on salary. I mean, it's that simple." (Tr. p. 115 lines 1-6)

It is not a difficult transition to consider the test result having identical conclusive effect with the members comprising the Civil Service Board at Officer Evans' hearing.

> "Our fundamental concern is that the trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion". State v. Catanese, 368 So.2d 975 (La. 1979).

B) Counsel for DeRidder also argues that the Third Circuit Court erred in not relying upon Louisiana Code of Evidence Articles 701-704. Louisiana Code of Evidence Article 702 establishes a procedure for an

expert to testify only as to matters that are calculated to be helpful to the jury and/or trier of fact. (Emphasis added). This procedure is buffered and/or balanced by Louisiana Code of Evidence Article 403 giving due consideration of the probative value/ prejudicial effect of the expert's opinion.

> **"Credibility, however, is for the jury - the jury is the lie detector in the courtroom."** State v. Foret, 628 So. 2d 1116, 1128 (La. 1993).

In Foret, supra, this Honorable Court considered the admission of a psychotherapist's opinion on an abuse victims' credibility. After consideration, this Court decided to allow admission of such opinions for the limited purpose of rebutting the victim's credibility, limited disclosures, or recanting of the testimony. Ultimately, this Honorable Court found that the use of the psychotherapist's opinion was not so limited, his elicited opinion constituted an improper comment on

the victim's credibility, and served to unduly prejudice the defendant.

Likewise, in the instant case, existence of prejudice is overwhelming. The opinion of the polygraph expert, bolstered an allegation of wrongdoing by Officer Evans. No other competent evidence exists which the opinion of the polygrapher would assist the trier of fact in determining/understanding.

In Foret, supra, the Court deemed it necessary to prohibit the testimony of a highly-educated psychotherapist on rendering an opinion concerning an abuse victim's credibility. Consistently, in the case at hand, this Court should prohibit an opinion by a polygrapher, whose only education requires a six week course in order to become licensed in this field, as to whether an officer in a civil service hearing made a prior truthful/untruthful statement concerning an

allegation of wrongdoing. In State v. Catanese, supra, relied upon by the City of DeRidder, the trial judge commendably established an eleven (11) point prerequisite to introduction of polygraph evidence, the first and foremost of which is the necessity of a "competent examiner". Of the criteria to make this determination it was suggested that the examiner "...have a baccalaureate degree or the judge be satisfied that he have equivalent experience and literacy [and] a working knowledge of psychology;" Catanese, supra at P. 976, footnote 1 (emphasis added).

Whether submitted to attack credibility or as substantive evidence, this record does not support admissibility.

OPPOSITION TO ASSIGNMENT OF ERROR NO. 3, 4 & 5:

The hearsay statements of Eric Pickens contain a plethora of inconsistencies. These inconsistencies

were, in part, disclosed during Officer Evans' termination hearing (although objected to by counsel for the City of DeRidder as being irrelevant). Simply put they are the statements of an individual who participated in a murder, made to feign cooperation with law enforcement, cast another party with involvement, and possible revenge for Officer Evans arresting him on August 14 (Tr. p. 87, lines 13-17). As noted by the Honorable Third Circuit Court of Appeal, the statements contain, at a minimum, two (2) crucial contradictions. Many others, however, exist.

In the statement given on August 28, 1997, Mr. Pickens made no mention of being a participant in the murder of Ernest Prater. Additionally, he stated that Johnny Evans, Jr., was not present when this disclosure was made.

Next, in his statement given on August 31, 1997,

Mr. Pickens disclosed that the information came from Johnny Evans, Jr.:

"Q. Okay, who told uh, who told that Ernest was ratting people out or . . . ?

A. Johnny.

Q. How did he know?

A. He said those dudes on Bishop told him.

Q. On Bishop?

A. He didn't say no names. He said some niggers on Bishop told me that Ernie was the one ratting us out.

Q. He never told you nobody else at any time, had he . . he had learnt ...that Ernest, that was the first that you knew Ernest was ratting?

A. Yeah, then I went over there and him and his daddy was talking about it."

The pronoun "him" used in this last statement can only refer to Johnny Evans, Jr., who was the individual being discussed in pp. 1-8 of that statement.

Thus, Johnny Evans, Jr., revealed that this information

came from "those dudes on Bishop" street. Further, this statement was made at a location other than the home of Johnny Evans, Sr., as Mr. Pickens indicated, "Yeah, then I went over there . . . "

In the questioning of Police Chief Arvin Malone, it was revealed that Eric Pickens had made an undercover purchase of drugs from J.J. Johnson.

MR. LESTAGE:

"Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

CHAIRMAN WILLIAMS:

Sustained.

MR. JONES

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

CHAIRMAN WILLIAMS

No, sir.

MR. JONES

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a questions in order to complete my proffer.

CHAIRMAN WILLIAMS:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

MR. JONES:

That completes my proffer on that question, Mr. Chairman"(Tr. p. 107 lines 1-25 and p. 108 l 1)

Yet, in his statement of August 31, 1997, Mr. Pickens indicated a lack of knowledge of J.J. Johnson.

"Q. Just you there. And he told you that , he had turned you and several more . . . J.J., who is he referring to as J.J.?

A. It's a dude named J.J. I don't know him, though."

Accordingly, it is respectfully submitted that the Honorable Third Circuit Court of Appeal correctly found these statement to lack credibility and trustworthiness.

Louisiana Code of Evidence Article 804(B)3 provides an exception to the hearsay rule for statements against interest. Mr. Pickens' statement on August 28, 1997 to Officer Johnson, Pine and Gott did not subject him to criminal liability. It is not a statement against his interest. At no time during that statement did he profess to be a participant in or have distinct knowledge of the murder of Ernest Prater. Additionally, its inconsistency with the later statement given on August 31, 1997 gravitates toward inadmissibility under the hearsay exception provided by Article 804(B)6.

As to the admissibility of the statement given on

August 31, 1997, the United States Supreme Court, in Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431 (1994), held that the term "statement" in Federal Rule 804(B)(3), does not refer to an extended declaration such as a report or narrative in its entirety. Louisiana Code of Evidence Rule 804(B)(3) is identical to the federal counterpart.

> "The fact that a person is making a broadly self-inculpatory statement does not make more credible the confessions non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth . . . " Williamson, supra, p. 2435.

The Williamson, supra, majority held that the Rule did not authorize admission of non-self-inculpatory statements made during the course of another's confession. This Honorable Court adopted the Williamson rationale in State v. Smith, 643 So. 2d. 1221 (La. 1994) Subsequently, this interpretation was

followed in State v. Coates, 661 So. 2d 571 (La. App. 2nd Cir. 1995), wherein the declarant implicated himself in the crime but attempted to place the ultimate blame on the defendant.

Finally, the City of DeRidder urges the remand of this matter for rehearing due to the conclusion of criminal proceedings against its previously "unavailable" witness. In urging the admissibility of these statements under Article 804(B)(3) the City of DeRidder should concede that the portions pertinent to this proceeding were not "self-inculpatory". The Fifth Amendment, asserted by Pickens at the Civil Service hearing, does not protect against non-inculpatory statements or disclosures. The City of DeRidder had the right and/or obligation to request that the Chairman direct the witness to answer the questions relevant to that hearing, notwithstanding the witnesses urgence of

the Fifth Amendment privilege against self incrimination. They chose not to do so. Nor would live testimony by Mr. Pickens negate the existence of inconsistencies and contradictions which rendered his hearsay statement untrustworthy. As counsel for the City of DeRidder astutely pointed out during this hearing,

> ". . .We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and its not - - certainly not for Chief Malone to decide now, nor to have decided on October 29. And we'd object to this line of questioning." (Tr. p. 105 lines 17-25, p. 106 lines 1-2)

CONCLUSION

Officer Johnny Evans, Sr., was a member of the United States Army for twenty-two (22) years and was honorably discharged at the rank of E-7, Sergeant First Class. He was classified with a top secret clearance rating for the last eighteen (18) of those years (Tr. p. 48, lines 13-14). After two (2) years with the Beauregard Parish Sheriff's Office, he joined the force of the DeRidder City Police on April 5, 1993. While with the DeRidder City Police he reported his own family members to the Beauregard Parish Narcotics Task Force for possible drug involvement. His exemplary record itself contradicts the allegations made against him. It is respectfully and humbly requested that this Honorable Court affirm the decision of the Third Circuit, Court of Appeal and restore Johnny Evans, Sr. to his rightful position.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ORIGINAL BRIEF IN OPPOSITION TO DEFENDANT'S WRIT OF REVIEW has been forwarded to counsel for defendants, David R. Lestage, Attorney at Law at 207 W. 2nd Street, P.O. Box 880, DeRidder, Louisiana 70634 , and Honorable Kenneth J. deBlanc, Clerk of the Third Circuit Court of Appeal, P.O. Box 16577, Lake Charles, Louisiana 71616 by mailing the same, postage pre-paid and properly addressed.

DeRidder, Louisiana, this 25th day of January, 2002.

/s/ Charles A. Sam Jones, III
CHARLES A. "SAM" JONES, III

SUPREME COURT OF LOUISIANA

No. 01-C-2466

JOHNNY M. EVANS, SR.

versus

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF BEAUREGARD

VICTORY, J.

We granted this writ application to determine whether the finding of the DeRidder Municipal Fire and Police Civil Service Board (the "Board"), that Johnny Evans, Sr. ("Evans") was dismissed in good faith and for cause, was supported by competent evidence. After reviewing the facts and the applicable law, we find that there is competent evidence in the record to support the Board's ruling.

FACTS AND PROCEDURAL HISTORY

On August 14, 1997, Earnest Prater, Jr. ("Prater") was arrested by DeRidder City Police in connection with a drive-by shooting. Evans, a member of the DeRidder City Police force, conducted the interview of Prater and at Prater's request, contacted

Beauregard Parish Deputy Sheriff Betty Pichon ("Pichon"), a member of the Narcotics Task Force. Prater told Pichon that he knew someone who had drugs, which led the police, including Evans, to the home of Eric Pickens ("Pickens"), where drugs were found and Pickens was arrested. Prater, who was co-operating with the police, was not booked and was released. Pickens was released on bond. On August 28, 1997, Prater was murdered. On August 28, 1997, Pichon took Pickens to the DeRidder Police Department and advised Sergeant John Gott that Pickens possibly had information concerning a motive in the murder of Prater. Pickens was not a suspect at that time. However, Pickens told Sergeant Gott and other officers that some time the week before, while Pickens was at Evans' residence, Evans told him that Prater was working for the police and that Prater had "busted" Pickens and another person. On August 31, 1997, Pickens gave a statement to Vernon Parish Sheriff s Deputies that Evans had told Pickens and Evans' son, Johnny Evans, Jr. ("Johnny"), that Prater had turned Pickens and another person in to the authorities. In this statement, Pickens also admitted that he was involved, to some extent, in the murder of Prater. Pickens later pled guilty to manslaughter in conne:ction with Prater's death. Johnny was also

arrested in the murder of Prater, and was convicted of second degree murder.

Upon learning of Pickens' allegations that Evans had disclosed confidential information which may have led Pickens and Johnny to kill Prater, DeRidder Chief ofPolice Arvin Malone ("Chief Malone") began an investigation. On September 25, 1997, Chief Malone sent a letter to Evans, informing him that he was under investigation and informing him of his rights. The letter also explained that Evans would have to take a polygraph examination.[1]

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[1] This type of polygraph is a machine that records and graphs three or four physical responses. These are galvanic skin response (sweating of the palms), the mean of the systolic and diastolic blood pressures, respiration rate, and sometimes changes in the blood flow in the tip of the index finger. These responses are measured by instruments placed on the subject being tested, and are made visible by simultaneous and continuous recording on a chart. The machine which connects the subject and the chart does not detect deception. Rather, the examiner studies the readings which are interpreted as giving indications of deception. The underlying theory of polygraphy is that conscious effort at deception by a rational individual causes involuntary and uncontrollable physiological responses that include measurable reactions in the bodily functions being monitored. It is up to the examiner to determine the suitability of the subject for testing, to formulate the proper test questions, to establish the

necessary rapport with the subject, to detect attempts to mask or create reactions on the chart, and to interpret the charts. Sheila K. Hyatt, Developments in the Law of Scientific Evidence: The Admissibility of Polygraph Evidence, 18 J.NAALJ 171, 179 (Fall, 1998)

In October, Evans took a polygraph examination administered by ABC Investigators, Inc., and as a result, the polygraphist, Pete Trahan, notified Chief Malone that Evans "has not told the entire truth to all of the pertinent questions" on the polygraph test.[2] As a result of the polygraph, Chief Malone recommended to Mayor Gerald Johnson that Evans be dismissed from his employment effective October 31, 1997. Mayor Johnson agreed and approved the dismissal. Evans appealed his dismissal to the Board, which held a hearing on December 18, 1997. At the hearing, Evans testified that he did not tell Pickens or his son that Prater was a confidential informant. The City attorney sought to present the testimony of Pickens and Johnny regarding the statements Pickens made to the police, but, because criminal charges were then pending against them in the death of Prater, they invoked their Fifth Amendment privileges and refused to testify .Thus, the City introduced the two statements

[2]The pertinent questions were: (I) "Do you know for sure who, informed on Ernest Prater?" (2) "Did you tell any unauthorized person that Ernest Prater was an informant?" (3) "Did you tell Eric Pickens that Ernest Prater was an informant?" (4) "Did you tell Johnny Evans, Jr. that Ernest Prater was an informant?". Evans answered "No" to each of these questions.

Pickens made to the authorities. Chief Malone testified that, because of the conflicting statements by Pickens and Evans, he ordered Evans to take a polygraph, and that, because Evans failed the polygraph, he was fired. The polygraphist also testified regarding his training and experience, his testing method, the questions asked on the test, and his opinion that Evans had not told the entire truth on the key questions at issue, namely, whether he had told Pickens that Prater was a confidential informant.

Based on the evidence presented, the Board found that the alleged violation by Evans did occur, and that the appointing authority acted in good faith and for cause in the discharge of Evans, and upheld the dismissal. On October 9, 2000, the trial court affirmed, finding that the Board's decision was not arbitrary and capricious and was supported by the evidence. Contrary to Evans' arguments, the trial court found that Pickens' statements were

admissible because hearsay is admissible in administrative hearings, and the statements were an exception to the hearsay rule under La. C. E. 804(B)(3) as statements against interest. The trial court held that the results of the polygraph are admissible in administrative hearings within judicial discretion on a case-by-case basis. The Third Circuit Court of Appeal reversed, finding that the polygraph: (1) was inadmissible as unreliable and irrelevant; (2) that it usurped the fact-finder's role; and, (3) was inadmissible under La. C.E. 607 to attack a witness's credibility. *Evans v. DeRidder Municipal Fire & Police Civil Service Board,* 01-118 (La. App. 3 Cir. 6/27/01),789 So. 2d 752. Because it ruled that the trial court committed legal error in admitting the polygraph, the court of appeal conducted a *de novo* review of the record and found that one of Pickens ' statements to the police was inadmissible as well, in that it did not fall under any hearsay exception and was inconsistent with the other statement he made. As a result of these conclusions, the court of appeal found that the Board did not possess sufficient cause to terminate Evans, and restored Evans to his former position. We granted the City's writ.

Evans v. DeRidder Municipal Fire & Police Civil Service Board, 01-2466 (La. 12/1.4/01.).

DISCUSSION

"In civil service disciplinary cases, an appellate court is presented with a multifaceted review function." *Bannister v. Dept. of Streets,* 95-C-0404 (La. 1/16/96), 666 So. 2d 641.,647 (citing *Waiters v. Department of Police of the City of New Orleans,* 454 So. 2d 106 (La. 1.984». "First, as in other civil matters, deference will be given to the factual conclusions of the Commissioner ." *Id.* The Commissioner. or Board. has a duty to decide independently from the facts presented whether the appointing authority [the Mayor] had good or lawful cause for taking the disciplinary action, and, if so, whether the punishment imposed is commensurate with the dereliction. *Waiters, supra.* "Hence, in deciding whether to affirm the Commission's factual findings, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review ." *Id.* "Second, in evaluating the Commission's determination as to whether the disciplinary action is both based on legal cause and commensurate with the infraction, the court, should

not modify the Commission's order unless it is arbitrary , capricious, or characterized by abuse of discretion." *Id.*

Under La. Const. Art. X, § 8(A), employees with permanent status in the classified civil service may be disciplined only for cause expressed in writing. Further, under the Louisiana Constitution, "cause" for the dismissal of such a person includes conduct prejudicial to the public service involved or detrimental to its efficient operation. La. Const. art. X, § 8(A). Here, there is no dispute that if Evans disclosed the confidential information, there would be sufficient cause for his dismissal.

The primary issue in this case is whether the evidence introduced at the administrative hearing to prove that Evans disclosed confidential information was admissible. In administrative hearings, the hearing officer has the discretion to admit evidence that would otherwise be inadmissible under the Louisiana Code of Evidence. *Chaisson v. Cajun Bag & Supply Co.,* 97-1255 (La. 3/4/98),708 So. 2d 375,381. Rule 10.4 of the Rules of Civil Service Commission provide that "[t]he rules of evidence as applied in civil

trials before the courts of this state need not be strictly complied with but the board shall limit evidence to matters having a reasonable l relevance to the issues before the board." Further, the findings of the Board must be based on competent evidence. *Chaisson, supra,. Gant v. Department of Police,* 99- 1351 (La. App. 4 Cir. 1/5/00), 750 So. 2d 382, 387, *writ denied,* 00-0688 (La. 4/20/00),760 So. 2d 1161; *Cittadino v. Department of Police,* 558 So. 2d 1311,1315 (La. App. 4 Cir. 1990).

Evans claims, and the appellate court found, that the polygraph results were inadmissible at the administrative hearing before the Board. We disagree.[3] Police officers throughout the land are routinely subjected to polygraph tests, in both the pre-employment screening process and in investigatory actions involving official misconduct. In fact, the Employee Polygraph Protection Act of 1988, which generally prohibits private employers from using polygraphs in the workplace, contains an exception for federal, state and local government employees. *See* 29 U .S.C. 2001- 2008.[4] Further, Louisiana courts have long recognized that a civil service

employee may be ordered to take a polygraph, and that the employee can be suspended or discharged for failing to take a polygraph. *See Creadeur v. Department of Public Safety, Div. of State Police,* 364 So. 2d 155 (La. App. 1 Cir. 1978); *Lemoine v. Department of Police,*

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[3]We make no ruling on whether a polygraph is admissible in a civil trial outside the context of an appeal of a Civil Service Board ruling in a Civil Service employee disciplinary proceeding.

[4]The Act prohibits the use of lie detector tests by private employers except under limited circumstances. 29 U.S.C. 2006 (d)-(t). Further, an employer may not discharge, discipline, discriminate, or deny employment or promotion on the basis of an employee' s refusal to take a lie detector test. Private employer exemptions to the Polygraph Protection Act include those relating to ongoing investigations, security services, and drug companies.

301 So. 2d 396 (La. App. 4 Cir. 1.974); *Frey v. Department of Police,* 288 So. 2d 410 (La. App. 4 Cir. 1973); *Dieck v Department of Police,* 266 So. 2d 500 (La. App. 4 Cir.1972); *Clayton v. New Orleans Police Dept,* 236 So. 2d 548 (La. App.4 Cir.), *writ denied,* 239 So. 2d 363 (La. 1970); *Roux v. New Orleans Police Dept,* 223 So. 2d 905 (La. App. 4 Cir.), *writ denied,* 227 So. 2d 148 (La. 1969); *see also Jackson v. Hudspeth Mental Retardation Center,* 573 So. 2d 750 (Miss. 1990) (where the Supreme Court of Mississippi held that

a civil service employees could be ordered to take a polygraph, and could be fired for refusing to submit to the polygraph). However, nothing a police officer says in a polygraph can be used against him in a subsequent criminal proceeding. *See Garrity v. New Jersey,* 385 U.S. 493,87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (holding that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under the threat of removal from office, and that it extends to all. .."); *see also Gardner v. Broderick,* 392 U.S. 273,88 S.Ct. 1913,20 L.Ed.2d 1082 (1968) (policeman who refused to waive his constitutional privilege against self-incrimination in connection with a grand jury proceeding investigating alleged bribery and corruption of police officers, cannot be discharged for his refusal to waive his rights).

This Court has held that polygraph results are per se inadmissible in criminal trials. *State v. Catanese,* 368 So. 2d 975 (La. 1979) (holding that "(a)lthough we conclude that polygraph evidence is inadmissible in criminal trials, the reasons for our decision do not prevent its introduction in post trial proceedings"). In *Catanese,* this

Court expressed the following policy reasons for the per se exclusion of polygraph results in criminal trials:

> (1) that the trier of fact would give conclusive weight to the polygraph expert's opinion;
>
> (2) that the polygraph technique is only capable of a high degree of accuracy when conducted under controlled conditions by an examiner who is highly qualified, and, in Louisiana, there are no laws providing for the licensing, regulating and disciplining of polygraph operators; and
>
> (3) that extensive procedural safeguards need to be established by courts or legislators before polygraphs are allowed to be introduced at trial.

368 So.2d at 981-982.

However, a leading commentator has advanced a number of reasons for treating evidentiary issues in administrative proceedings differently, including: (1) administrative proceedings may encompass both legislative and adjudicative functions; (2) juries are not involved and the factfinder is usually a person with special expertise in the subject matter of the inquiry; (3) the judicial officer also exercises investigative functions; and (4) non-lawyers frequently are involved in the process. Frank I. Maraist, Louisiana Civil Law Treatise: Evidence and Proof, Vol. 19, § 1.2, p. 6 (1999). Further, contrary to the policy concerns expressed in *Catanese* relative to

criminal trials, in an administrative proceeding concerning disciplinary action against a police officer, "appellant's position as a police officer, burdened with the additional distinguishing feature of his employment that he is a symbol of public trust and law enforcement who must remain above all suspicion which might tend to lessen this image and that of the entire police department, demand(s] an immediate corroboration of his statement denying any wrongdoing. ..," *Frey, supra* at 412, In addition, in 1980, after the decision in *Catanese,* Louisiana enacted a statute regulating polygraphists, La. R.S. 37 :2831, *et seq.* We find that these policy reason support the admissibility of the polygraph results in this case.

Further, Chief Malone was faced with a very serious accusation against one of his police officers, as it involved the possible disclosure of confidential information which may have led to the murder of the informant, In the face of Evans' denial, Chief Malone had the right, under both state and federal law, to order Evans to take a polygraph test. Surely he should have the right to use this evidence at an administrative hearing to justify his decision recommending that Evans be dismissed.

Having found no reason for barring the admission of the polygraph evidence in this case, we must now determine whether the results of this polygraph test were l admissible in the administrative hearing as "competent" evidence, In *Chaisson,* we held that "competent" evidence was evidence that ""has some degree ot reliability and trustworthiness and is of the type that reasonable persons would rely upon" and that "this determination must be made on a case-by-case basis under the particular facts and circumstances." 708 So. 2d at 382. "The reviewing court must evaluate the competency of the evidence under the manifest error standard." *Id.* At trial, the polygraphist testified that he had been licensed in the State of Louisiana since 1985 to conduct polygraphs, that he had conducted between 500-600 polygraphs, that he was board certified, and that he conducted polygraphs for numerous state agencies. He admitted that the polygraph was not lOO % accurate and was cross-examined vigorously on the possible inaccuracies of the polygraph. Sheriff Malone testified that he considered the possibility that Evans' polygraph results may not have been accurate in making his decision to fire Evans. Finally, no irregularities in the test were established

that would be grounds for excluding the polygraph in this case. *See Arnold v. New Orleans Police Dept.*, 383 So. 2d 810 (La. App. 4 Cir.), *writ denied,* 385 So. 2d 274 (La. 1980) (finding that the polygraph was inadmissible because the police officer and the third party were so intoxicated that their memory of the events was not genuinely reliable).

As previously stated, the Board ruled that the polygraph results were admissible, as it was entitled to do in its discretion. Having reviewed this ruling under the manifest error standard, we find that the polygraph evidence in this case was competent evidence.

Finally, the Board determined the proper weight to be given the polygraph results, as the polygraphist was vigorously cross-examined on the accuracy and methodology of the testing procedures. After weighing the evidence, the Board found that "the evidence and testimony presented to the B9ard established that the alleged violations did occur" and that "the appointing authority acted in good faith and for cause in the disciplinary action taken against Officer Evans."

Just as police officers can be fired for failing to submit to a polygraph when ordered to do so if the request is reasonable under the circumstances, police officers can be fired if they fail a polygraph. Chief Malone was entitled to present the evidence to the Board that he relied upon in making his decision to recommend Evans' dismissal. Indeed, it would be ludicrous if the appointing authority, in this case the mayor, could fire a police officer based on the results of a polygraph test he was entitled to obtain, but that the appointing authority could not present the evidence to justify his decision to fire the officer at the administrative hearing before the Board. Therefore, we find that the results of a properly administered polygraph are admissible in an administrative hearing before the Board, held to review whether the appointing authority had good or lawful cause for taking disciplinary action against a police officer. It is the province of the Board to determine the weight to be given this evidence. Further, in this case, the Board had other evidence to support the allegation that Evans disclosed confidential information. We find that the Board was not clearly wrong in admitting the

polygraph into evidence in order to determine whether Evans was dismissed for cause.[5]

Evans also argues, and the coul1 of appeal agreed, that the out-of-court statements made by Pickens were inadmissible hearsay. On August 28, 1997, Pickens gave a statement of DeRidder Police Officers as follows:

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[5]We also disagree with the court of appeal's reliance on *United States v. Schelfer,* 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), in ruling that the polygraph was inadmissible. *Schelfer* merely upheld the Court of Military Justice' s per se statutory rule against the admission of P91ygraph evidence in court martial proceedings in the face of a defendant's constitutional challenge that such an exclusion violated the right of an accused to present a defense under the Fifth and Sixth Amendments. In fact, the Court in *Schelfer* noted the vast use of polygraph tests by the government, primarily in the field of personnel screening, and pointed out that these "out of court uses of polygraph techniques obviously differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in criminal trials." 523 U.S. at 312, n. 8.

> ...that some time last week he was at J ohnny Evans, Sr. residence on Louise St. He stated that Johnny, Sr. told him in the living room of the res. that Ernest was working for the police, Eric stated that Johnny, Sr., then stated that Ernest had busted Eric and J.J. Johnson. Eric stated that Johnny, Sr. stated to him "Ernest is the Police."
>
> Eric went on to tell officers that this statement from Johnny, Sr. was totally unsolicited and Johnny Sr. had just volunteered the information. Eric stated at the time, Johnny, Jr. was in his room at the house and was not present, Eric went on to tell officers that later he talked to Johnny, Jr. about what Johnny, Sr. had said and Johnny, Jr. stated "didn't I tell you that Ernest was working f~r the police."

On August 31, 1997, Pickens gave a statement to Vernon Sheriff s deputies, and answered their questions as follows:

> Q. Okay. Who told, uh, who told that Ernest was ratting people out or ...?
> A. Johnny.
> Q. How did he know?
> A. He said those dudes on Bishop told him.
> Q. On Bishop?
> A. He didn't say any names. He said some [people] on Bishop told me that Ernie was the one ratting us out.
> Q. He never even told you nobody else at any time, had he. ..he had learnt . ..that Ernest, that was the first that you knew that Ernest was ratting?
> A. Yeah, then I went over there and him and his daddy was talking about it. Q. What did they say?
> A. Talking about Ernest was turning people in, and that's why he ain't in jail right now. Cause he got a $70,000 bond.

Q. What did Evans, Sr. say about it?
A. That the only reason Ernest's out right now, is because he's turning people in.
Q. Did he say who he'd turned in, maybe you or anybody else?
A. He said, you and J.J. He say he turned ya'll in, that's why he's out right now.
Q. That was Johnny Evans, Sf. said this? A. Yes sir.
Q. And when was this here? A. It was like last week.
Q. Like last week? About what date, give me a date.
A. Like in the middle of the week, I don't even know what day it was. ..
Q. Where was ya'll at, when he told you this?
A. We was at his house.
Q. At Mr. Evans' house?
A. Yes sir.
Q. What was ya'll doing?
A. Johnny had went over there, cause he had his son. And he had to babysit that day, so we just went over there and I had my girlfriends little boy. So we went over there and let them play.
Q. Over to Johnny Evans, Sr.'s house?
A. Oh, huh, and his daddy was sitting there talking, talking to us about. ..
Q. How did it get brought up?
A. Cause he said, uh, how long you been smoking weed? That's how it came up, he asked me how long I been smoking weed, and I was like, I been smoking for awhile. Like that. ..then he was like, you know you can't come to DeRidder and smoke no weed, and people that don't like you, they gonna turn you in. Like that, then I was like, yeah. Look at Ernest Prater, he's turning everybody in.
Q. And Ernest, uh, Johnny Evans Sr. is the one that said that, told you and Johnny Evans Jr.? Was anyone else there with ya'll, when he told you?
A. No, just us three.

> Q. Just you three. And he told you that, he had turned you and several more. ..J.J.., who is he referring to as J.J. ?
> A. It's a dude named J.J. I don't know him, though.
> Q. But Johnny Evans, Sr. had told you that Ernest had turned you and J.J. in? '
> A. Uh huh. And he said it was some other people, he didn't name them other people.
> Q. But he said, he had turned some other people?
> A. Yes sir.

Hearsay statements may be admissible in an administrative hearing, provided the evidence is determined to be competent. *Chaisson, supra* at 382. Further, these two statements fall under the hearsay exception of La. C.E. art. 804(B)(3), as statements against interest. Even though he was not yet a suspect in Prater's murder , Pickens' first statement clearly indicated that he had a motive to kill Prater. Likewise, the second statement, taken after he became a suspect, again provided police with Pickens' motive to kill Prater . The court of appeal also found that the two statements lacked credibility and trustworthiness, pointing out what it considered to be inconsistencies in the statements.[6] Yet, having determined that the statements were

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[6] On the first inconsistency, the court of appeal reasoned as follows: Mr. Pickens stated that Johnny did not mention names. Instead, "He

[Johnny] said some [people] on Bishop told me that Ernie [Prater] was the one ratting us out." Not only does this underscore a critical inconsistency, but it also demonstrates that there could have been another source for his information other than Patrolman Evans. admissible, it was up to the Board, as the trier of fact, to determine the weight to give these statements and to determine whether they were inconsistent. Contrary to the court of appeal's reasoning, the Board could have concluded that the statements reflect that "Johnny," referring to Johnny Evans, Jr., made a statement to Pickens prior to the meeting at Evans' residence to the effect that people on Bishop Street told Johnny that Prater was a police informant. Rather than discredit Pickens, the Board could have concluded that it bolstered Pickens' credibility , because he told DeRidder Police on August 28, 1997 that after Evans told him the information and he in turn told Johnny, that Johnny said, "didn't I tell you that Earnest was working for the police?" Further, the fact that someone else told Johnny or Pickens that Prater was a police informant, in no way lessens Evans' responsibility not to disclose confidential information. The Board may well have concluded that a statement by a trusted and informed police officer would carry more

weight, and would more likely be accepted as true by Pickens and Johnny, than rumors heard on the street.

The court of appeal found a second inconsistency in determining that Pickens , statements were untrustworthy, that is, that in one statement he stated that Johnny was present when the disclosure was made, and in another statement he said that Johnny was not in the room when the disclosure was made. However, the Board could have found that both statements recite that Johnny and Pickens were at Evans' residence on the date the disclosure was made, and that Evans volunteered to Pickens that Pickens and "J.J." had been arrested because Prater had turned them into police. Further, even if inconsistent, it is the Board's responsibility to determine the weight of the evidence, which can only be reversed if manifestly erroneous. We find no manifest error here.

CONCLUSION

In administrative hearings involving civil servant disciplinary actions, evidence is admissible if it is competent and has a reasonable relevance to the issues before the board. This determination must be made on a case-by-case basis, and will not be

overturned unless manifestly erroneous. Although not 100% reliable, the results of a properly administered polygraph test are competent evidence and are of the type upon which reasonable persons would rely. Further, the two statements made by Pickens constituted exceptions to the hearsay rule as statements against interest under La. C.E. art. 804, and they were not so inconsistent as to be incompetent. Finally, the Board was made well aware of the reliability issues with both the polygraph and the two statements by Pickens, and was entitled to determine the proper weight to be given them. Thus, we defer to the factual conclusions of the Board, and we find that the Board's determination was based on legal cause and commensurate with the infraction, and was not arbitrary , capricious, or characterized by abuse of discretion.

DECREE

For the reasons stated herein, the judgment of the court of appeal is reversed and the judgment of the trial court is reinstated.

REVERSED; TRIAL COURT JUDGMENT REINSTATED.

SUPREME COURT OF LOUISIANA

No.2001-C-2466

JOHNNY M. EV ANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

CALOGERO, Chief Justice, dissents.

The majority's opinion is based on the fallacy that an employer may simply terminate a civil service employee who refuses to submit to a polygraph examination. However, the lower court cases cited by the majority hold that refusal to submit to a polygraph examination may be deemed insubordination justifying dismissal only under certain circumstances. In Creadeur v. Dep't of Public Safety, Div. of State Police, 364 So. 2d 155, 157-58 (La. App. I Cir. 1978), the primary appellate court case relied upon by the majority, the court held that "as a general rule a police officer may be required to take a polygraph or similar test where the request is reasonable

and bears sound relationship to police work, lawful departmental policy or interdepartmental matters, but that the rule is not absolute and is subject to the exception of reasonableness under the circumstances of each case." Notably, in Creadeur, which relied on Roux v. New Orleans Police Dep't, 223 So. 2d 905 (La. App. 4th Cir. 1969), the appellate court, in determining the reasonableness of the request, was especially impressed with the appointing authority's testimony that the officer was informed when he was asked to submit to the examination that the results thereof would not be used to discharge the officer "or anything like that but to channel the investigation, to show us in what direction to follow." 364 So. 2d at 156. Not only are the results of the polygraph examination being offered by the appointing authority to justify Officer Evans's dismissal in the instant case, the majority also appears to hold today that mere refusal to submit to an examination can justify dismissal in and of itself. Even if that holding were correct, it is one thing to allow an employer to terminate for insubordination a civil service employee who refuses to submit to a polygraph examination, and it is quite another to say that polygraph examination results may be

admitted as competent evidence in a judicial or even quasi-judicial proceeding against the employee to justify his dismissal. Because I disagree that the one necessarily follows the other, I respectfully dissent from the majority's holding today.

As the majority notes, the issue in this case is whether the polygraph examination results may be reasonably found to be competent evidence admissible in an administrative proceeding. The fact that an employee may be fired for insubordination under special circumstances for refusing to submit to a polygraph examination does not make polygraph results legally competent evidence. I do not disagree that it might appear incongruous to the casual observer to allow the appointing authority to require an employee to submit to a polygraph examination or else be terminated, but then not allow the results of the examination in evidence at an administrative hearing to justify the decision to dismiss the employee. Yet, the majority concedes that the results of the examination would not be admissible in a criminal trial against the police officer. To my mind, the same reasons for not allowing such evidence in a criminal or civil proceeding militate against allowing , such evidence in an

administrative proceeding, where, as the majority concedes, lay persons are frequently involved. Ante, p. 8.

I find the reasons for disallowing polygraph examination or stress test results in criminal cases to be relevant to the instant case. As the majority notes, in State v. Catanese, 368 So.2d 975 (La. 1979), we set forth several policy reasons for not allowing such evidence in criminal trials: (I) the fact-finder would give conclusive weight to the polygraphist's opinion; (2) the reliability of the examination results depends solely on the polygraphist's skill; and (3) no extensive procedural safeguards exist governing the admission of polygraph results. The majority addresses none of these policy considerations specifically; instead, the majority states generally that administrative proceedings should be treated differently than ordinary trials for various reasons and that police officers hold a position of public trust. However, there is no indication here that the proceeding before the Board meets any of the majority's stated conditions for treating evidentiary issues regarding polygraph examinations differently than we treat such issues in ordinary criminal or civil trials. The Board here was merely adjudicating a

dispute between the appointing authority and the civil servant, and there is no suggestion that it was composed of non-lawyer members who had any expertise in polygraph results. Elsewhere, the majority, presumably in addressing the Catanese policy reasons, simply concludes that the Board gave proper weight to the polygraph examination results and observes that the licensed polygraphist was extensively cross-examined by counsel, ostensibly establishing the reliability of the witness's interpretation of the polygraph measurements. The fact remains that the Board in this case functioned as any other jury might in determining the credibility of a party and the weight to give the testimonial evidence.

In my view, the court of appeal had it right on a number of points. In this case, the dispute was between the internally-conflicting, self-serving hearsay statements of a convicted killer tone statement of which contained hearsay-within-hearsay of still another convicted murderer, and the testimony of a police officer with no prior disciplinary infractions who denied divulging confidential information to his son or Pickens, and who, in fact, had previously turned his son in to law enforcement authorities on drug charges. As

the court of appeal reasonably found, the Board clearly relied on the polygraphist's testimony and his interpretation of the results of his examination of the police officer employee to overcome the weak hearsay evidence against the officer and to justify the appointing authority's decision. The lay board members simply adopted the "lie detector" test results to find that the officer was not credible, thereby giving conclusive weight to "developing and inexact" scientific evidence, a result we explicitly warned against in Catanese.

The court of appeal next pointed out the questionable reliability of polygraph results. As the majority itself notes, the physiological measurements are fairly straightforward and "[i]t is up to the examiner to determine the suitability of the subject for testing, to formulate proper test questions, to establish the necessary rapport with the subject, to detect attempts to mask or create reactions on the chart, and to interpret the charts." Ante, p. 2, n. 1. Although polygraphists might now be licensed and subject to certain professional requirements since our decision in Catanese, the fact remains that the reliability of the test results is entirely dependent upon the skill and the subjective decisions of the examiner, who, as

the Supreme Court has recognized, is effectively giving his opinion on the subject's truthfulness or deception on another occasion without any knowledge of the relevant facts. United States v. Scheffer., 523 U.S. 303 (1998). Moreover, as the appellate court observed, the witness's opinion testimony is based on the subject's physiological responses, which have not been scientifically proved to be causally related to truthfulness or deception. Evans v. DeRidder Municipal Fire and Police Bd, 01-118, pp. 5-6 (La. App. 3 Cir. 6/27/01), 789 So.2d 752, 757-58. Justice Knoll in her concurrence recognizes the science as "developing and inexact." Tellingly, the majority makes no mention of whether the state of the science justifies accepting polygraph results today as reliable evidence in a judicial or quasi-judicial proceeding. Instead, the majority simply notes that the witness was cross-examined as to possible inaccurate test results.

Finally, the majority, as Justice Weimer apparently recognizes in his concurrence, neglects to impose any restrictions or even basic evidentiary guidelines , on the admissibility of polygraph test results in civil service proceedings, despite our cautionary

language in Catanese, The rationale of Chaisson v. Cajun Bag & Suply Co.,97-1255 (La. 3/4/98),708 So. 2d 375, discussed by the majority simply does not provide the "extensive procedural safeguards" we said in Catanese would be necessary for polygraph examination results to be admitted in evidence.

The majority opinion, when it comes down to its essence, simply turns on the facile logic that a civil service employee may be fired for insubordination for refusing , to submit to a "lie detector" test, ergo the appointing authority should be able to . introduce the results in a civil proceeding to justify a decision to dismiss the employee when the results of that test are negative. In Catanese, we recognized that polygraph examination results might be admissible in a post-trial setting to determine whether anew trial should be granted, that is, in circumstances where the defendant's guilt or innocence is not at issue and the trial judge decides both the admission of the evidence and the weight to give it. I understand our reasoning there to suggest that polygraph examination results might have a role to play in the search for truth, as opposed to simply being the final arbiter on truth or deception. Clearly the Creadeur court

recognized as much. Thus, it is not illogical to allow an appointing authority to require under reasonable circumstances that the civil servant submit to a polygraph examination in the authority's search for the truth, i.e., as an investigative tool, yet not permit the subsequent introduction of the negative results of such an examination in a quasi-judicial proceeding to prove that the civil servant was deceptive on a particular occasion" and thus conclusively determine the civil servant's credibility, a role best left to the fact-finder unencumbered by questionably-reliable opinion testimony.

Based on the foregoing reasons, I would affirm the court of appeal's finding that the Board erred in allowing in evidence the testimony of the polygraphist regarding his interpretation of the results of the polygraph examination.

SUPREME COURT OF LOUISIANA

No.2001-C-2466

JOHNNY M. EV ANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

KNOLL, Justice, concurring.

It is with great reluctance that I concur with the majority's holding allowing the admissibility of polygraph test results in the administrative review of a termination decision. First, I wish to underscore that the use of such evidence is confined to administrative proceedings, and in no way can it be used in criminal trials. *See State* v. *Catanese,* 368 So.2d 975 (La. 1979).

Furthermore, I feel compelled to caution against expanding the role of polygraph tests, the administration and interpretation of which is recognized to be "a developing and inexact science." *See, e.g., United States* v. *Gilliard,* 133 F .3d 809, 812 (1lth Cir. 1998), citing *United States* v. *Piccinonna,* 885 F.2d 1529, 1535 (llth Cir. 1989). Just as the majority of the court recognizes that admissibility

of polygraph evidence is limited to the type of administrative proceedings utilized in this case, the majority also notes that plaintiffs employer, Chief Malone, sought polygraph evidence as a last resort, a second point which merits additional emphasis.

The majority observed that Pickens and Johnny "both invoked their Fifth Amendment privileges and refused to testify. ...Chief Malone testified that, because of the conflicting statements by Pickens and Evans, he ordered Evans to take a polygraph " *Evans v. DeRidder Mun. Fire and Police Civ. Svc. Bd.*, 01-C-2466, p. 3 (La. 2002), ____So.2d ____, _____.Thus, with Pickens and Johnny unavailable to testify, Chief Malone was left in a precarious position. On the one hand, allegations of profound misconduct were made against one of his officers, a person in a position of great public trust, and on the other hand, to learn the truth, Chief Malone had only hearsay statements and the conflicting word of the officer .

To get to the heart of matter, Chief Malone resorted to a polygraph test. It was a last resort, and the majority's opinion indicates that the evidence garnered from the test could not alone decide the matter: "It is province of the Board to determine the

weight to be given this evidence. *Further, in this case, the Board had other evidence to support the allegation that Evans disclosed co1lfidential information." Evans, 01-* C-2466, p. 10, ____ So.2d at _____ (emphasis added).

Accordingly, the majority saves for another day the question of whether polygraph evidence alone could justify a termination decision, or indeed, justify by itself any other governmental action. Even so, the point should not be lost that in the instant case, this court sanctioned the initial step, i.e., the decision to administer a polygraph test, only after finding that the proponent of the test was left with no other viable options. In so doing, while finding polygraph evidence admissible under these limited circumstances, the majority's holding can be said to stand for the proposition that future efforts to employ machinery to diagnose human veracity should likewise be employed rarely and sparingly. However, I would not leave this significant caveat to be implied, but would explicitly so hold.

SUPREME COURT OF LOUISIANA

No.2001-C-2466

JOHNNY M. EV ANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

WEIMER, J., concurring.

I concur with the majority opinion, but note the well written and thorough opinion of Judge Woodard which found the polygraph test results inadmissible. **Evans v. DeRidder Municipal Fire & Police Civil Service Board,** 01-0118 (La.App.3 Cir. 6/27/01),789 So.2d 752, writ granted, 01-2466 (La. 12/14/01),803 So.2d 977. I am persuaded to concur because a law enforcement officer can be terminated from employment for failure to submit to a polygraph test. **Creadeur v. Department of Public Safety, Division of State Police**, 364 So.2d 155 (La.App. 1 Cir. 1978), and cases cited therein.

It logically follows that the appointing authority can consider termination based on the officer's failing the polygraph test. It would

be incongruous to then rule that one could not introduce evidence used in helping make the determination to terminate the officer's employment. Nevertheless, the determination of who is telling the truth is a sacred determination. The polygraph test is merely a tool to assist the fact finder. Fact finders must be wary not to abdicate the responsibility for determining the truth to a machine or to the expert who operates the machine.

Further, I note that in **Creadeur**--a case cited by the majority--the appellate court held that as a general rule a police officer may be required to take a polygraph or similar test where the request is reasonable and bears sound relationship to police to the exception that one is not required to submit to an order to take a polygraph test which is unreasonable or when a legitimate reason exists for refusal to obey such an order. ***Id.*** at 157 .See also, **Jackson v. Department of Health and Hospitals, Office for Citizens with Developmental Disabilities**, 98-2772, p. 8 (La.App. 1 Cir. 2/18/2000), 752 So.2d 357,363.

Certainly, in the instant case, the reasonableness criteria noted in **Creadeur** is satisfied.

I also note that Officer Evans testified and the fact finder had the opportunity to evaluate his credibility.

Supreme Court, U.S.
FILED
NOV 20 2002
CLERK

(4)

No. 02-650

IN THE
Supreme Court of the United States

JOHNNY M. EVANS, SR.,

Petitioner,

v.

CITY OF DeRIDDER, LOUISIANA and
DeRIDDER MUNICIPAL FIRE &
POLICE CIVIL SERVICE BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.4(c)

In addition to the parties listed by Petitioner, the State of Louisiana should be considered a party hereto pursuant to 28 U.S.C. § 2403(b) and the Louisiana Attorney General should have been served with the Petition in keeping with Rule 14.1(e)(v) since Petitioner attacks the constitutionality of a Louisiana statute and neither the State of Louisiana nor any agency, officer, or employee thereof is a party.

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STATEMENT OF THE CASE

In the early morning hours of Thursday, August 14, 1997 decedent, Earnest Prater, Jr., was arrested by DeRidder City Police and taken to DeRidder City Hall to be interviewed. Petitioner, Johnny M. Evans, Sr. ("Evans, Sr."), conducted that interview and at Prater's request called Beauregard Parish Deputy Sheriff Betty Pichon, who was a member of the Beauregard/DeRidder Narcotics Task Force. Evans, Sr. then put Prater on the phone with Dep. Pichon, whereupon Prater stated that he knew someone who had about a pound of marijuana and some cocaine and asked if Dep. Pichon could come help him because he was being arrested. Evans, Sr. took the phone and spoke some more with Dep. Pichon, who along with the other members of the aforesaid Task Force, Deputy Sheriff Saul Wilson and DeRidder Police Sergeant John Gott, then went to City Hall to speak with Prater in person. That meeting led to the arrest of an acquaintance of Prater's, Eric Pickens. Prater was not booked, but rather, was released by the DeRidder Police. Prater cooperated with the Task Force to some extent thereafter, including gaining the interest of a friend, Johnny M. Evans, Jr. ("Evans, Jr."), Petitioner's son, in a reverse drug sting, until Prater's murder on August 25, 1997.

On August 28, 1997, Dep. Pichon took Eric Pickens to the DeRidder Police Department and advised Sgt. Gott that Pickens possibly had information concerning a motive in the murder of Prater. Pickens was not a suspect in any crime at that time. However, Pickens then told Sgt. Gott, DeRidder Police Lieutenant Ricky Johnson and Sergeant Kenny Pine that some time the week before while Pickens was at Evans, Sr.'s residence that Evans, Sr. told him Prater was working for the police and that Prater "busted" Pickens and another

person. Then, on August 31, 1997 Pickens gave a statement to Vernon Parish Sheriff's Deputies which stated that Evans, Sr. had told Pickens and Evans, Jr., that Prater had turned Pickens and another person in to the authorities.

After learning of the allegations against Evans, Sr., DeRidder Chief of Police Arvin Malone began the official steps toward an investigation into whether or not Evans, Sr. actually had divulged confidential information to the effect that the decedent, Earnest Prater, Jr., was working undercover to assist law enforcement and that that information led to the arrest of Pickens on August 14, 1997. The investigation ultimately led to the polygraph of Evans, Sr., whereupon the polygraphist rendered a report advising Chief Malone that Evans, Sr. had not told the entire truth as to all of the questions pertinent to the issue of whether he revealed the fact that Prater was the confidential informant whose information led to Pickens' arrest. Upon receipt of the polygraphist's opinion, Chief Malone recommended on October 29, 1997 that Evans, Sr. be dismissed from his employment, effective October 31, 1997, to which Mayor Gerald Johnson agreed and approved the dismissal, effective October 31, 1997.

Evans, Sr. appealed his dismissal to the DeRidder Municipal Fire and Police Civil Service Board ("Board"), which held a hearing regarding that termination on December 18, 1997. The aforementioned facts developed in the investigation were presented to the Board, whereupon the Board found that the alleged violation by Evans, Sr. did occur, that the appointing authority acted in good faith and for cause in the discharge of Evans, Sr. and upheld the dismissal, all by unanimous vote. Both Pickens and Evans, Jr. invoked their right not to testify when questioned before the Board. After the Board hearing and the appeal to the District Court, Eric

Pickens pled guilty to manslaughter and Evans, Jr. was convicted of second degree murder concerning the death of Prater.

On October 9, 2000, the Honorable Stuart S. Kay, Jr., Judge, Thirty-sixth Judicial District Court of the State of Louisiana, in and for the Parish of Beauregard, affirmed the Board's decision for the reasons set forth in his REASONS FOR JUDGMENT AFFIRMING BOARD RULING rendered on August 26, 2000. (App. Vol. I p. A-18) Mr. Evans appealed to the Louisiana Court of Appeal, Third Circuit which rendered Judgment on June 27, 2001 reversing the District Court. (App. Vol I p. A-61) On July 9, 2001, Respondents applied for a rehearing to the Court of Appeal, Third Circuit regarding its said Judgment and moved for the aforesaid remand. The Court of Appeal, Third Circuit denied Respondents' relief by Judgment on Rehearing rendered August 8, 2001. (App. Vol. I p. A-50) An application for writ of review was taken from the action of the Court of Appeal, Third Circuit, which was granted by the Supreme Court of Louisiana on December 14, 2001. (App. Vol. II p. A-125) On April 3, 2002 the Supreme Court of Louisiana reversed the Court of Appeal, Third Circuit and reinstated the District Court's decision upholding the termination of Evans, Sr. (App. Vol. II p. A-167) On April 17, 2002, Evans, Sr. filed his Application for Re-hearing to the Supreme Court of Louisiana. Re-hearing was denied on May 24, 2002.

REASONS FOR DENYING THE PETITION

I.

FAILURE TO COMPLY WITH RULES OF COURT AND TO TIMELY PRESENT QUESTIONS TO BOARD AND COURTS BELOW

Petitioner asserts jurisdiction pursuant to 28 U.S.C. § 1257. The only state statute to which reference is made as being unconstitutional is La. R.S. 33:2561, which concerns the procedure for an appeal by an employee in the classified civil service to the Civil Service Board. He also claims violation of due process both as it concerns that Section 2561 and as it relates to articles of the Louisiana Code of Evidence, especially Article 804 B(3).

Mr. Evans' claim of unconstitutionality of the said Section 2561 appears to invoke the application of 28 U.S.C. § 2403(b). It does not appear that Petitioner has complied with the Court's Rule 14.1(e)(v) by reciting in his Petition that 28 U.S.C. § 2403(b) may apply, nor has Petitioner served his Petition on the Louisiana Attorney General.

It is unclear, if, much less where or when, Petitioner raised any alleged federal questions before the DeRidder Municipal Fire and Police Civil Service Board, the Thirty-sixth Judicial District Court of the State of Louisiana, the Louisiana Court of Appeal, Third Circuit or the State of Louisiana Supreme Court as is required by Rule 14.1(g)(i) of this Honorable Court. Since Petitioner's alleged federal claims discussed in the arguments on at least his second through fifth questions apparently were not presented to the Board or Courts until his Application for Rehearing to the

Louisiana Supreme Court. Therefore, those questions were not timely presented in light of *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001); *Campbell v. Louisiana*, 523 U.S. 392,118 S.Ct. 1419, 140 L.Ed.2d 551 (1998); and *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997), and this Honorable Court should not grant review. Nevertheless, assuming *arguendo* that the Court entertains the application, Respondents will address the alleged federal questions.

II.

POLYGRAPH RESULTS WERE PROPERLY ADMITTED INTO EVIDENCE IN THE HEARING OF THE CIVIL SERVICE BOARD

Contrary to Petitioner's allegations, the Louisiana Supreme Court's decision supports the case-by-case determination of admissibility of expert testimony provided by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 79, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as well as by *Kumho v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The decision of Louisiana's Court of Appeal, Third Circuit essentially established a *per se* exclusionary stance concerning polygraph tests which certainly was contrary to those decisions of this Court, as well as that dealing with polygraphs in *United States v. Pasado*, 57 F.3d 428 (5th Cir. 1995). *Pasado* discarded the Fifth Circuit's prior position of inadmissibility of polygraph evidence.

The Louisiana Supreme Court reviewed the expertise of the polygraphist which was developed in the Civil Service Board hearing and found no irregularities in the methodology, testing, procedures or accuracy acknowledged by the Board.

The District Court's approval of the Board's treatment of that expert testimony in light of Louisiana's Code of Evidence Articles 702-703, which were taken from their federal counterparts, Articles 702-705, F.R.E., was also approved by Louisiana's Supreme Court below.

The Louisiana Supreme Court pointed out that deference is given to such a Board's conclusions. (App. Vol. II, A-173) The Court noted the Board's duty to decide independently from the facts presented whether the Mayor had good and lawful cause to terminate Mr. Evans. It also reiterated the principle that a reviewing court must affirm the Board's decision unless it was clearly wrong or manifestly erroneous. (App. Vol. II, A-173) Such boards can admit evidence which would not be admissible under the Louisiana Code of Evidence. (App. Vol. II, A-174) Rule 10.4 of the Rules of Civil Service Commission, which was followed by the Board below, was cited by the Court as providing that " '[t]he rules of evidence as applied in civil trials before the courts of this state need not be strictly complied with but the board shall limit evidence to matters having a reasonable relevance to the issues before the board.' " (App. Vol. II, A-174-175) The Court also found that such evidence must be competent. (App. Vol. II, A-175)

As demonstrated in the City's Exhibit 3 in the Board Hearing, Mr. Evans was notified by DeRidder City Police Chief Malone of the complaint lodged against him and that an investigation was being initiated. That exhibit also shows that he was represented by counsel at least forty-four (44) of the fifty-nine (59) days between notification and termination. It also reveals that his counsel wrote the Chief no fewer than nine (9) times concerning Mr. Evans' rights and the investigation, including the Chief's offer to allow Mr. Evans

to select the polygraph examiner to conduct the polygraph. That same attorney represented Mr. Evans before the Board where he vigorously cross-examined the polygraphist concerning his training, experience, expertise, machine, methodology and results. The Board, which had an independent legal counsel who actively participated, admitted the polygraph results and found Mr. Evans' termination to be in good faith and for cause.

The District Court rejected Petitioner's citations and argument regarding the use of polygraph here. That Court pointed out that in each of the cases cited by Mr. Evans the Courts exercised discretion by excluding polygraph examinations due to irregularities peculiar to each such case. The District Court pointed out that no such irregularities appeared in this case, but rather, "the conditions appeared to be optimum as required by *Catanese*." (App. Vol. I, A-25) That Court went on to favorably compare the proceedings before, and decision by, the Board to the principle set forth in *Rowe v. State Farm Mut. Auto. Ins. Co.*, 95-669 (La. App. 3 Cir. 3/6/96), 670 So.2d 718, 728:

> 'As a general rule, the factual basis of an expert's opinion goes to the credibility of the testimony, not its admissibility, and it is up to the opposing party to examine the factual basis of the opinion in cross-examination. *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988).'

(App. Vol. I, A-26). Clearly, the District Court relied upon Louisiana Code of Evidence Articles 701 through 704 regarding expert testimony in affirming the acceptance of polygraph evidence by the Board and its reliance upon same in upholding Mr. Evans' termination. Contrary to Petitioner's

assertion, Louisiana Code of Evidence 104(a) and its counterpart, Federal Rule of Evidence Article 104(a), do not dictate otherwise.

The Louisiana Supreme Court rejected Petitioner's position that the polygraph results were inadmissible, noting that " 'Louisiana courts have long recognized that a civil service employee may be ordered to take a polygraph and that the employee can be suspended or discharged for failing to take a polygraph.' " (App. Vol. II, A-175-176) Further the Court acknowledged several reasons to treat evidentiary matters before boards differently than before criminal courts. (App. Vol. II, A-178) Similarly, it reiterated that a police officer is burdened with a special position of being " 'a symbol of public trust and law enforcement who must remain above all suspicion which might tend to lessen this image and that of the entire police department' ", thereby demanding " 'an immediate corroboration of his statement denying any wrongdoing. . . .' " (Citation omitted) (App. Vol. II, A-179) In addition, the Court noted that legislation had been enacted in Louisiana regulating polygraph examiners following a previous ruling by it in a criminal case rejecting admission of polygraph results, thereby evidencing current approval of polygraph examinations in Louisiana. Further, the Court found that the Board was justified in admitting the polygraph evidence since it met the test for "competency" in that it had " 'some degree of reliability and trustworthiness and is of the type that reasonable persons would rely upon.' " (App. Vol. II, A-180)

Petitioner cited *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) for the first time in his Application for Rehearing to the Louisiana Supreme Court. He cites it here, also. This Court in *Greene* found it prejudicial

not to make reports available to the Petitioner. No such deprivation existed here, rather, Petitioner was furnished with the materials of which he complains, including polygraph results and statements of Eric Pickens to law enforcement. Counsel for Mr. Evans had the right to subpoena witnesses, including law enforcement officers to whom Pickens spoke, and to subpoena documents, and he did both. He had the right to thoroughly cross-examine witnesses, including the polygraphist, and he engaged in such extensive cross-examination.

Petitioner's reliance upon *U.S. v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) is also misplaced. *Scheffer* dealt with an appeal by an airman who was convicted by a general court-marshal and complained that his defense was thwarted by Military Rule of Evidence 707 which declares polygraph evidence inadmissible in court-marshals. As this Honorable Court noted, that Rule was the result of a declaration by the President. Obviously, no such rule exists in Louisiana. The Louisiana Supreme Court's decision below to leave the determination of admissibility of polygraph evidence to the Board, subject to judicial review as was done here, is the sounder rule.

III.

THE PLEA OF UNCONSTITUTIONALITY WAS NOT TIMELY RAISED

Mr. Evans ascribes unconstitutionality at least to Louisiana Revised Statutes Title 33, Section 2561. Since Mr. Evans did not contest the unconstitutionality by specially pleading such a claim and particularizing the grounds for that claim until now, he cannot be heard to contest it before

this Honorable Court. See *Adarand Constructors, Inc. v. Mineta, supra*, and *Adams v. Robertson, supra*. As stated in *Istre v. Meche*, 2000-1316 (La. 10/17/00), 770 So.2d 776, 779, relying upon *Williams v. State Dept. of Health & Hospitals*, 95-0713 (La. 1/26/96), 671 So.2d 899 and *Vallo v. Gayle Oil Co., Inc.*, 94-1238 (La. 11/30/94), 646 So.2d 859:

> 'First of all, the plea of unconstitutionality must first be made in the trial court. Next, the plea of unconstitutionality must be specially pleaded. Finally, the grounds outlining the basis of unconstitutionality must be particularized.' *Williams*, 95-0713 at pp. 4-5, 671 So.2d at 902 (internal citations omitted). These procedural rules exist to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute. *Vallo*, 94-1238 at p. 9, 646 So.2d at 865. This opportunity to fully brief and argue the issue provides the trial court with thoughtful and complete arguments relative to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to adjudge the constitutionality of the statute.

The Louisiana Supreme Court will not consider such claims when they have not been pleaded before and addressed by the District Court. *See Boudreaux v. State*, 2001-1329 (La. 2/26/02) 815 So.2d 7.

IV.

PETITIONER'S DUE PROCESS CLAIMS ARE UNFOUNDED

Assuming *arguendo* that the Court entertains Mr. Evans' argument on questions I and II, however, his reliance upon the Due Process clauses of the Constitution is not well founded. Under Louisiana law statutes are presumed to be constitutional and any doubt in that regard is resolved in favor of constitutionality. *See State v. Weaver*, 2001-0467 (La. 1/15/02), 805 So.2d 166, 170. An attack upon a statute such as La. R.S. 33:2561, which concerns termination of a classified civil servant such as Mr. Evans, requires Mr. Evans to carry the heavy burden of proving violation of substantive due process and/or procedural due process. He did not timely make that argument in the Louisiana courts and his argument here fails to carry that burden.

Fields v. State, 98-0611 (La. 7/8/98), 714 So.2d 1244, 1250 discusses the two distinct protections afforded by the due process clauses of the Louisiana and federal constitutions, namely, substantive due process and procedural due process. The Court there went on to point out, "a court looks only at whether a particular legislative measure was a rational way to correct a problem" and that "the test of substantive due process is whether the regulation is rational in relation to the goal sought to be obtained and is adopted in the interest of the community as a whole." (Citations omitted) *Id.* at 1250. Certainly Louisiana's statutory law establishing the grounds for discipline of a classified city civil servant for commission of an act prejudicial to the departmental service or contrary to the public interest under La. R.S. 33:2560 A.3. is a regulation which is rational in relation to the goal of

maintaining standards of service through disciplinary action which was adopted in the interest of Louisiana's cities and their citizens. So is La. R.S. 33:2561. The notification of Mr. Evans of the investigation, the exchange between Mr. Evans and/or his attorney and Police Chief Malone for almost two (2) months concerning the investigation and polygraph, the notice of discharge and right to a hearing to which Mr. Evans availed himself and the ultimate appeal of the decision of the Board all evidence that Mr. Evans was not arbitrarily deprived of his position of trust as a DeRidder City Police Officer, so substantive due process has not been denied him. *See Babineaux v. Judiciary Commission*, 341 So.2d 396 (La. 1976).

Mr. Evans also complains that he was denied due process by not being afforded a hearing before a qualified attorney-Judge or a trial de novo subsequent to the administrative hearing. However, as the Louisiana Supreme Court stated in *Lott v. Department of Public Safety*, 98-1920 (La. 5/18/99), 734 So.2d 617 at p. 621:

> In *Wall v. Close*, 201 La. 986, 10 So.2d 779, 784 (1942), this Court previously noted that '[n]o one has a vested right in any given mode of procedure.' Our state may determine the process by which legal rights are asserted and enforced so long as a party receives due notice and an opportunity to be heard. *Id.*

Exhibit City 3 evidences that Mr. Evans was made well aware of a complaint having been lodged against him in an investigation concerning his allegedly telling his son, Johnny M. Evans, Jr., and Eric L. Pickens, a good friend of his son, that Earnest Prater, Jr. was a confidential informant and that

his information led to Pickens' arrest. The documents constituting that Exhibit City 3 make it clear that the alleged offense was a serious one which could lead to termination from Mr. Evans' employment. That fact was obviously well understood as can be seen from the letters of Mr. Evans' attorney who represented him vigorously and well by continuously maneuvering tactically to defend and benefit Patrolman Evans. Those defense tactics included hints of civil action against the City concerning the administration of a polygraph test. They also included delaying tactics concerning such a polygraph test. As mentioned hereinabove, Mr. Evans nevertheless submitted to a polygraph test. When Chief Malone considered the polygraph test results, as well as the investigation he instigated, which included two (2) statements of Eric L. Pickens, Mr. Evans' son's friend, which incriminated Mr. Pickens with information to the effect that Patrolman Evans had disclosed to Mr. Pickens and Johnny M. Evans, Jr. that Earnest Prater was a confidential informant, Chief Malone recommended dismissal of Mr. Evans. Mayor Johnson concurred and dismissed Mr. Evans, whereupon Mr. Evans availed himself of the administrative hearing process afforded by the aforesaid statutes, which involved his calling of witnesses, testifying himself and cross-examining the City's witnesses, all of which resulted in the Board's affirming the Mayor's action, whereupon Mr. Evans availed himself of the judicial review process afforded him by those laws. It is worthy to note that the Board retained an independent attorney advisor to assist it in matters such as determination of admissibility of evidence. The record of that hearing clearly reflects that the Board in fact relied upon the advice of that attorney.

Mr. Evans' reliance upon *North v. Russell*, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976) is misplaced. *North*

dealt with due process in the context of a judicial tribunal, albeit a police court in which by statute the Judge did not have to be an attorney. In the matter *sub judice*, an administrative proceeding was involved. In *Lott*, *supra*, the Louisiana Supreme Court cited *Hamilton v. Louisiana Health & Human Resources Admin.*, 341 So.2d 1190, 1193 (La. App. 1st Cir. 1976), *writ refused*, 344 So.2d 4 (La. 1977) with approval as follows:

> In *Hamilton*, the appellant argued that an appeal hearing should be held before the State Civil Service Commission, or at least one member of that commission, who could see and hear witnesses and assess their credibility. Absent such presence on the part of the commission, the appellant urged that the appointment of a referee to hold a hearing and take evidence was a denial of due process. The court, observing that procedural due process as applied in the field of administrative law is more flexible than its application in a judicial tribunal, held that the opportunity of the State Civil Service Commission to hear witnesses was not an 'indispensable prerequisite' to due process in administrative hearings so long as the party involved is afforded ample opportunity to confront and cross examine witnesses and to present his own case in full. *Hamilton*, 341 So.2d at 1193-94 (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)). Furthermore, as Article 10, Section 12 of our state constitution is the source of the State Civil Service Commission's authority to appoint a referee to take testimony, the court concluded that to require a regular trial in such circumstances would result in a negation of that constitutional provision. *Id.* at 1194.

V.

INCRIMINATING STATEMENTS TO LAW ENFORCEMENT OFFICERS BY ERIC PICKENS CONSTITUTE COMPETENT EVIDENCE AND HEARSAY EXCEPTIONS

Petitioner claims that two (2) statements to law enforcement officers by Eric Pickens, who claimed his right not to testify before the Board and later pleaded guilty to manslaughter in the death of Prater, incriminating himself and that Mr. Evans told him and the other convicted killer that Prater furnished information to law enforcement which led to Pickens' drug arrest, were erroneously admitted by the Board. Petitioner cites *Williamson v. U.S.*, 512 U.S. 594, 114 S.Ct., 2431, 129 L.Ed.2d 476 (1994), a criminal case, in support of his position. There, this Honorable Court remanded for determination of whether statements were truly self-inculpatory. The Louisiana Supreme Court determined here that Pickens' statements were self-inculpatory and also inculpated Mr. Evans, just as the District Court did in affirming the Board's admitting those statements. The Louisiana Supreme Court also found the statements were properly considered by the Board pursuant to Louisiana Code of Evidence Art. 804 B(3). It pointed out that the statements constitute competent evidence pursuant to *Chaisson v. Cajun Bag & Supply Co.*, 97-1255 (La. 3/4/98), 708 So.2d 375 and were thus admissible in an administrative hearing. (App. Vol. II, A-186)

Petitioner also claims his right to cross-examine has been denied by admission of Pickens' statements. Again, Pickens invoked his right not to testify before the Board. However, Mr. Evans testified and denied that he told Pickens or his

son any such incriminating information. Counsel for Mr. Evans could have called as witnesses the two (2) different law enforcement agencies' officers to whom Pickens made the statements but apparently chose not to. As *Lilley v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) provides, the Confrontation Clauses of the Sixth and Fourteenth Amendments apply to criminal defendants. The Louisiana Supreme Court in *Chaisson, supra*, acknowledged the inability of counsel to cross-examine as to such statements in an administrative hearing and allowed the use of same. In a similar matter that Court in *State v. Marston*, 2000-0589 (La. 3/16/01), 780 So.2d 1058, rejected an analogous objection as to business records and stated at p. 1064:

> We therefore find no particularized basis in the present case for departing from the general rule that a defendant's right to confront his accusers is satisfied if hearsay evidence 'has sufficient guarantees of trustworthiness to come within a firmly rooted exception to the hearsay rule.' *White v. Illinois*, 502 U.S. 346, 358, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992); *see 2 McCormick on Evidence*, § 252 p. 125 ('[H]earsay falling within a traditional or "firmly rooted" exception to the rule will be admissible under the Confrontation Clause. Where the exception does not require unavailability because of the theoretical superiority of the out-of-court statement, the Constitution does not require it.' (footnote omitted).

The Court also relied upon *White v. Illinois*, *supra*, in *State v. Robinson*, 2000-2284 (La. 1/12/01), 776 So.2d 431 in discussing admissibility of excited utterances at p. 432:

> Assuming that the state meets the foundational requirements for this firmly rooted hearsay exception, *see State v. Henderson*, 362 So.2d 1358, 1361 (La. 1978), the introduction of a victim's excited utterance does not violate the Confrontation Clause even when it constitutes the only direct evidence that the defendant committed the offense.

Louisiana's Court of Appeal, Fourth Circuit in *State v. Keys*, 99-0418 (La. App. 4 Cir. 11/8/00), 772 So.2d 918, 923 permitted the use of such statements since the opponent of those statements was permitted to fully cross-examine the witnesses to the out-of-court statements at issue. The Fourth Circuit cited its opinion in *State v. Henderson*, 95-0267 (La. App. 4 Cir. 4/3/96), 672 So.2d 1085, *writ denied*, 96-1160 (La. 10/11/96), 680 So.2d 648 for that same proposition. *Henderson*, *supra*, at 1090, noted that *Park v. Huff*, 506 F.2d 849, 860 (5th Cir. 1975), *cert. denied*, 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975) allowed such statements when the opponent was afforded the opportunity to cross-examine the witnesses thereto. *Henderson*, *supra*, also found that proposition to be in accord with *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

Here the Board obviously determined the statements of Pickens to be consistent. The Louisiana Supreme Court decided that the Board was entitled to make the determinations as to consistency and the weight to be given those statements and refused to reverse as being manifestly erroneous. That decision should be upheld.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari to review the judgment of the State of Louisiana Supreme Court be denied.

Respectfully submitted,

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